

BEFORE THE ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

CLAYTON L. HOELSCHER)

Petitioner,)

vs.)

DIRECTOR OF THE DEPARTMENT)

OF INSURANCE, FINANCIAL)

INSTITUTIONS AND PROFESSIONAL)

REGISTRATION)

STATE OF MISSOURI,)

Respondent.)

Case No.: 09-1186 DI

FILED

SEP 29 2009

ADMINISTRATIVE HEARING
COMMISSION

ANSWER AND MOTION FOR SUMMARY DECISION

COMES NOW, John M. Huff, Director of the Department of Insurance, Financial Institutions, and Professional Registration, through counsel, and hereby answers and moves for summary decision on Petitioner Clayton L. Hoelscher's Complaint as follows:

1. The Director has insufficient information to admit or deny the allegations in the Complaint, and therefore denies the same.
2. To the extent Hoelscher alleges that the Director wrongfully refused Hoelscher's application for an insurance producer license, the Director denies the same.

In further Answer, the Director states as follows:

3. On July 24, 2009, the Director issued an Order refusing Hoelscher's application for an insurance producer license. *See Exhibit A, attached.*
4. On July 27, 2009, the Director notified Hoelscher by certified mail that his application for an insurance producer license had been refused. *Id.*
5. In the Order and Notice mailed to Hoelscher, the Director advised Hoelscher of his right to appeal the refusal within 30 days after the mailing of the Notice pursuant to § 621.120, RSMo. *Id.*
6. On August 26, 2009, Hoelscher filed his Complaint with the Administrative Hearing Commission, the body of which stated "I AM REQUESTING A HEARING REGARDING THE DEPT OF INSURANCE DECISION TO DENY MY APPLICATION FOR A PRODUCER LICENSE."

7. The Commission scheduled a hearing on this matter for December 3, 2009. Such date is at least 45 days distant.

MOTION FOR SUMMARY DECISION

A. GROUNDS FOR REFUSAL – FELONY OR CRIME OF MORAL TURPITUDE

8. Sufficient legal and factual grounds exist for refusing Hoelscher's application for an insurance producer license pursuant to § 375.141.1(6), RSMo (Supp. 2008).

9. Section 375.141.1(6), RSMo (Supp. 2008), provides:

The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:

* * *

(6) Having been convicted of a felony or crime involving moral turpitude;

10. The facts are as follows:

- a. On May 22, 2009, the Department received a Uniform Application for Individual Insurance Producer License from Hoelscher. *See Exhibit B, attached.*
- b. In the section of the Application headed "Background Questions," Background Question # 1 asks, "Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?"
- c. Hoelscher answered "Yes" to Background Question # 1.
- d. Hoelscher disclosed a 1989 felony conviction in the United States District Court for the Eastern District of Missouri. Hoelscher was found guilty of one count of Distribution and Possession with Intent to Distribute Cocaine for his involvement with a cocaine distribution ring operating in the St. Louis area with supply connections in California. He was sentenced to 78 months in federal prison and four years supervised probation. *See Exhibit C, attached.*
- e. The Eighth Circuit Court of Appeals affirmed Hoelscher's felony conviction. *See United States v. Hoelscher, et al, 914 F.2d 1527 (8th Cir. 1990). See Exhibit D, attached.*
- f. Hoelscher was released from prison on April 28, 1995.

11. Hoelscher may be refused an insurance producer license pursuant to § 375.141.1(6), RSMo (Supp. 2008), because the offense of Distribution and Possession with Intent to Distribute Cocaine is a felony pursuant to 21 U.S.C § 841(a)(1).

12. Additionally, Hoelscher may be refused an insurance producer license pursuant to § 375.141.1(6), RSMo (Supp. 2008), because the offense of Distribution and Possession with Intent to Distribute Cocaine is a crime of moral turpitude.
13. A crime involving “moral turpitude” is a crime involving “an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything ‘done contrary to justice, honesty, modesty, and good morals’.” *In re Frick*, 694 S.W.2d 473, 479 (Mo. banc 1985).
14. Hoelscher may be refused an insurance producer license pursuant to § 375.141.1(6), RSMo (Supp. 2008), in that the acts constituting the offense of Distribution and Possession with Intent to Distribute Cocaine are contrary to justice, honesty, and good morals, and the offense is therefore a crime of moral turpitude. Federal and state courts have concluded that participation in illicit drug trafficking is a crime involving moral turpitude. *Atlantic Richfield Co. v. Guerami*, 820 F.2d 280 (9th Cir. 1987) (holding that possession with intent to distribute is a crime involving moral turpitude); *Matter of Gorman*, 379 N.E.2d 970, 971-72 (Ind. 1978) (holding that conviction under 21 U.S.C. § 841(a)(1) for possession with intent to distribute, conspiracy, and distribution of cocaine is a crime involving moral turpitude); *Muniz v. State of Texas*, 575 S.W.2d 408 (Tex. Civ. App. 1978) (holding that conviction for willfully, knowingly, and unlawfully conspiring to import a controlled substance is for a crime involving moral turpitude and is grounds for disbarment). *U.S. ex rel. De Luca v. O'Rourke*, 213 F.2d 759, 762 (8th Cir. 1954) (there can be nothing more depraved or morally indefensible than conscious participation in the illicit drug traffic. The evils which result from unlawfully importing or dealing with unlawfully imported narcotic drugs are a matter of common knowledge).

B. GROUNDS FOR REFUSAL – DISHONEST PRACTICES

15. Sufficient legal and factual grounds exist for refusing Hoelscher’s application for an insurance producer license pursuant to § 375.141.1(8), RSMo (Supp. 2008), because Hoelscher engaged in dishonest practices.
16. Section 375.141.1(8), RSMo (Supp. 2008), provides:

The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:

* * *

(8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.
17. Hoelscher previously attempted to argue that his role in the cocaine distribution ring was minimal in order to reduce his prison sentence. However, the Eighth Circuit

Court of Appeals found substantial evidence that demonstrated that Hoelscher “was deeply involved in a conspiracy to distribute large quantities of cocaine,” and “strong evidence that Hoelscher was a significant member of the drug conspiracy.” *United States v. Hoelscher, et al*, 914 F.2d 1527, 1533 and 1541 (8th Cir. 1990). *See Exhibit D, attached*. More recently, Hoelscher attempted to minimize his involvement in the drug conspiracy by placing the blame on a co-conspirator for convincing him with the lure of “easy money” to “bail out [Hoelscher’s] failing business.” *See Exhibit B, attached*. Such failure to clearly disclose the depth of Hoelscher’s involvement in the drug conspiracy is a dishonest practice, and evidences a lack of good moral character and rehabilitation. Section 314.200, RSMo (2000).

C. LICENSE REFUSAL IS DISCRETIONARY

18. The Director has considered the history of Hoelscher and all the circumstances surrounding Hoelscher’s Application. Hoelscher’s criminal history indicates a substantial risk to the public should Hoelscher receive an insurance producer license, as licensed producers must be worthy of trust. Hoelscher was convicted of a felony that was also a crime of moral turpitude and his behavior following that conviction evidenced dishonest practices and a lack of rehabilitation.
19. Licensure of Hoelscher would not be in the public interest, and, accordingly, the Director exercised his discretion to refuse to issue Hoelscher an insurance producer license. The principal purpose of § 375.141, RSMo (Supp. 2008), is not to punish licensees or applicants, but to protect the public. *Ballew v. Ainsworth*, 670 S.W.2d 94, 100 (Mo.App. E.D. 1984). The Director’s refusal to license Hoelscher should be upheld to protect the public.
20. The Director has established that cause exists to refuse Hoelscher’s insurance producer license based upon §§ 375.141.1(6) and (8), RSMo (Supp. 2008). Once cause for refusal is established, the Director’s discretion should be upheld pursuant to § 374.051, RSMo (Supp. 2008), which provides, in part:

Notwithstanding section 621.120, RSMo, the director shall retain discretion in refusing a license or renewal and such discretion shall not transfer to the administrative hearing commission.

21. Section 621.120, RSMo, (2000), provides:

Upon refusal by any agency listed in section 621.045¹ to permit an applicant to be examined upon his qualifications for licensure or upon refusal of such agency to issue or renew a license of an applicant who has passed an examination for licensure or who possesses the qualifications for licensure without examination, such applicant may file, within thirty days after the delivery or

¹ The Department of Insurance, Financial Institutions and Professional Registration is listed among the agencies over which the Commission has jurisdiction regarding licensing disputes.

mailing by certified mail of written notice of such refusal to the applicant, a complaint with the administrative hearing commission. Such written notice of refusal shall advise such applicant of his right to file a complaint with the administrative hearing commission and have a hearing pursuant to this section. Such complaint shall set forth that the applicant has passed an examination for licensure or is qualified to be examined for licensure or for licensure or renewal without examination under the laws and administrative regulations relating to his profession and shall set out with particularity the qualifications of such applicant for same. Upon receipt of such complaint the administrative hearing commission shall cause a copy of said complaint to be served upon the agency by certified mail or by delivery of such copy to the office of the agency, together with a notice of the place of and the date upon which the hearing on said complaint will be held. If at the hearing the applicant shall show that under the law he is entitled to examination for licensure or licensure or renewal, the administrative hearing commission shall issue an appropriate order to accomplish such examination or licensure or renewal, as the case may be.

22. Language similar to § 374.051, RSMo (Supp. 2008), is found in § 590.100.3, RSMo (2000), which provides, in part:

Any applicant aggrieved by a decision of the director² pursuant to this section may appeal within thirty days to the administrative hearing commission, which shall conduct a hearing to determine whether the director has cause for denial, and which shall issue findings of fact and conclusions of law on the matter. The administrative hearing commission shall not consider the relative severity of the cause for denial or any rehabilitation of the applicant or otherwise impinge upon the discretion of the director to determine whether to grant the application subject to probation or deny the application when cause exists pursuant to this section.

23. The Administrative Hearing Commission interpreted § 590.100.3, RSMo (2000), as a limitation upon the Commission's discretion. "When any statutory cause for denial exists, we do not have discretion to determine whether the applicant is entitled to enter the basic training course." *Hurd v. Director of Department of Public Safety*, Mo. Admin. 09-0269 PO, 2009 WL 1709021 (Mo.Admin.Hrg.Comm.) (upholding refusal of petitioner's application for entrance into a basic training course without consideration of severity of the cause for denial or any rehabilitation of the petitioner where state agency proved cause for refusal).

² "Director," as used in § 590.100.3, refers to the Director of the Missouri Department of Public Safety.

AFFIRMATIVE DEFENSES

24. Hoelscher's Complaint does not comply with § 621.120, RSMo (2000), or 1 CSR 15-3.350(2)(C), in that Hoelscher's Complaint has not set out with particularity his qualifications for licensure and the Complaint should therefore be dismissed.
25. Hoelscher's Complaint merely states: "I AM REQUESTING A HEARING REGARDING THE DEPT OF INSURANCE DECISION TO DENY MY APPLICATION FOR A PRODUCER LICENSE."
26. Hoelscher's allegations, taken as true, fail to allege a claim upon which relief may be granted, and the Director's pleading affirmatively establishes that he is entitled to entry of a summary decision in his favor. Therefore, under 1 CSR 15-3.446(3), the Director is entitled to a decision on the pleadings in the Director's favor.
27. The pleadings, together with Exhibits A, B, C, and D, show there is no genuine issue as to any material fact and the Director is entitled to judgment as a matter of law.

WHEREFORE, the Director, having fully answered, respectfully requests this Commission grant the Director's motion for summary decision and uphold the Director's decision to refuse Hoelscher's application for an insurance producer license, and such other relief as this Commission deems just and proper.

Respectfully submitted,



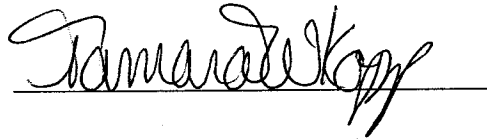
Tamara W. Kopp
Missouri Bar # 59020
Senior Enforcement Counsel
Missouri Department of Insurance, Financial
Institutions & Professional Registration
301 West High Street, Room 530
Jefferson City, Missouri 65101
Telephone: (573) 751-2619
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Tamara.kopp@insurance.mo.gov

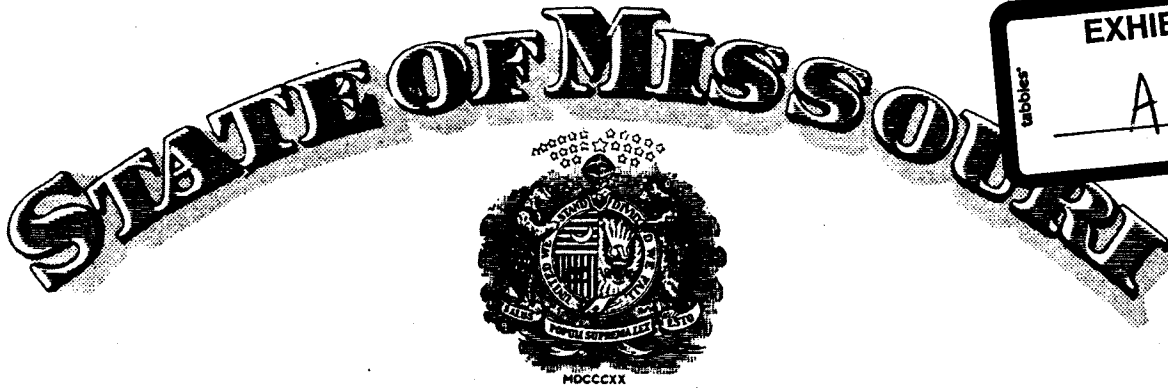
ATTORNEY FOR RESPONDENT
Director of the Missouri Department of
Insurance, Financial Institutions &
Professional Registration

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing, including all attachments, was mailed first class, with sufficient postage attached, via the United States Postal Service on this 29th day of September, 2009 to:

Clayton L. Hoelscher
37 Picardy Drive
Lake St. Louis, Missouri 63367
636-561-3958
636-299-3025

A handwritten signature in cursive script, appearing to read "Tamaral Kopp", is written over a horizontal line.



**DEPARTMENT OF INSURANCE, FINANCIAL
INSTITUTIONS AND PROFESSIONAL REGISTRATION**

P.O. Box 690, Jefferson City, Mo. 65102-0690

CERTIFIED COPY

I, John M. Huff of the Department of Insurance, Financial Institutions and Professional Registration, State of Missouri, do hereby certify that the annexed pages are a true and correct copy of the original,

**IN THE MATTER OF:
CLAYTON L. HOELSCHER
CASE # 09-07025589C**

REFUSAL TO ISSUE INSURANCE PRODUCER LICENSE

Which said original is now on file in this Department.



IN WITNESS WHEREOF, I have hereunto
set my hand and caused to be affixed hereto
the Seal of said Department. Done at my
office in Jefferson City, Missouri, on this
9th day of September 2009.


JOHN M. HUFF, DIRECTOR



State of Missouri

DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS & PROFESSIONAL REGISTRATION

IN THE MATTER OF:

Clayton L. Hoelscher,

Applicant.

Serve At:

37 Picardy Drive

Lake St. Louis, Missouri 63367

Case No. 09-0702589C

REFUSAL TO ISSUE INSURANCE PRODUCER LICENSE

On July 22, 2009, Tamara W. Kopp, Senior Enforcement Counsel and Counsel to the Consumer Affairs Division, submitted a Petition to the Director alleging cause for refusing to issue an insurance producer license to Clayton L. Hoelscher. After reviewing the Petition, the Investigative Report, and the entirety of the file, the Director issues the following findings of fact, conclusions of law, and summary order:

FINDINGS OF FACT

1. Clayton L. Hoelscher ("Hoelscher") is an individual residing in Missouri, whose mailing address of record is 37 Picardy Drive, Lake St. Louis, Missouri 63367.
2. On May 22, 2009, the Department received a Uniform Application for Individual Insurance Producer License from Hoelscher.
3. In the section of the Application headed "Background Questions," Background Question # 1 asks "Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?"
4. Hoelscher answered "Yes" to Background Question # 1.
5. Hoelscher disclosed a 1989 felony conviction in the United States District Court for the Eastern District of Missouri. Hoelscher was found guilty of one count of Distribution and Possession with Intent to Distribute Cocaine for his involvement with a cocaine distribution ring operating in the St. Louis area with supply

connections in California. He was sentenced to 78 months in federal prison and four years supervised probation. The Eighth Circuit Court of Appeals affirmed Hoelscher's conviction. See *United States v. Hoelscher, et al*, 914 F.2d 1527 (8th Cir. 1990).

6. Hoelscher was released from prison on April 28, 1995.

CONCLUSIONS OF LAW

7. Section 375.141.1, RSMo (Supp. 2008), provides:

The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:

* * *

- (6) Having been convicted of a felony or crime involving moral turpitude;

* * *

- (8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere;

* * *

8. A crime involving "moral turpitude" is a crime involving "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything 'done contrary to justice, honesty, modesty, and good morals'." *In re Frick*, 694 S.W.2d 473, 479 (Mo. banc 1985).
9. The principal purpose of § 375.141, RSMo (Supp. 2008), is not to punish licensees or applicants, but to protect the public. *Ballew v. Ainsworth*, 670 S.W.2d 94, 100 (Mo.App. E.D. 1984).
10. Hoelscher may be refused an insurance producer license pursuant to § 375.141.1(6), RSMo (Supp. 2008), because the offense of Distribution and Possession with Intent to Distribute Cocaine is a felony pursuant to 21 U.S.C 841(a)(1).
11. Hoelscher may be refused an insurance producer license pursuant to § 375.141.1(6), RSMo (Supp. 2008), in that the acts constituting the offense of Distribution and Possession with Intent to Distribute Cocaine are contrary to justice, honesty and good morals, and the offense is therefore a crime of moral turpitude. Federal and state courts have concluded that participation in illicit drug trafficking is a crime involving moral turpitude. *Atlantic Richfield Co. v. Guerami*, 820 F.2d 280 (9th Cir. 1987) (holding that possession with intent to distribute is a crime involving moral turpitude); *Matter of Gorman*, 379 N.E.2d 970, 971-72 (Ind. 1978) (holding that conviction under 21 U.S.C. § 841(a)(1) for possession with intent to distribute, conspiracy, and distribution of cocaine is a crime involving moral turpitude); *Muniz v. State of Texas*, 575 S.W.2d 408 (Tex. Civ. App. 1978) (holding that conviction for willfully, knowingly, and unlawfully conspiring to import a controlled substance is

for a crime involving moral turpitude and is grounds for disbarment). *U.S. ex rel. De Luca v. O'Rourke*, 213 F.2d 759, 762 (C.A.8 1954) (there can be nothing more depraved or morally indefensible than conscious participation in the illicit drug traffic. The evils which result from unlawfully importing or dealing with unlawfully imported narcotic drugs are a matter of common knowledge).

12. Hoelscher may be refused an insurance producer license pursuant to § 375.141.1(8), RSMo (Supp. 2008), because the offense of Distribution and Possession with Intent to Distribute Cocaine involves fraud. "[A]ll crimes in which fraud is an ingredient are crimes involving moral turpitude. . . [t]he crime of dealing with narcotic drugs known to have been smuggled into the United States is certainly no less reprehensible and probably no less a fraud. . ." *U.S. ex rel. De Luca v. O'Rourke*, 213 F.2d 759, 762 (8th Cir. 1954), *Jordan v. DeGeorge*, 341 U.S. 223, 232.
13. The Director has considered the history of Hoelscher and all the circumstances surrounding Hoelscher's Application. Hoelscher's criminal history indicates a substantial risk to the public should Hoelscher receive an insurance producer license, as licensed producers must be worthy of trust. Hoelscher was convicted of felony that was also a crime of moral turpitude and included an element of fraud. Licensure of Hoelscher would not be in the public interest, and, accordingly, the Director exercises his discretion to refuse to issue Hoelscher an insurance producer license.
14. This order is in the public interest.

ORDER

IT IS THEREFORE ORDERED that the insurance producer license of Clayton L. Hoelscher is hereby summarily **REFUSED**.

SO ORDERED.

WITNESS MY HAND THIS 24th DAY OF JULY, 2009.





JOHN M. HUEF
DIRECTOR

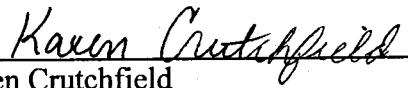
NOTICE

TO: Applicant and any unnamed persons aggrieved by this Order:

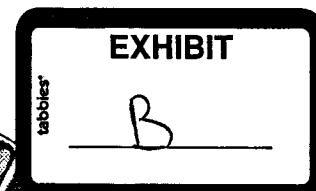
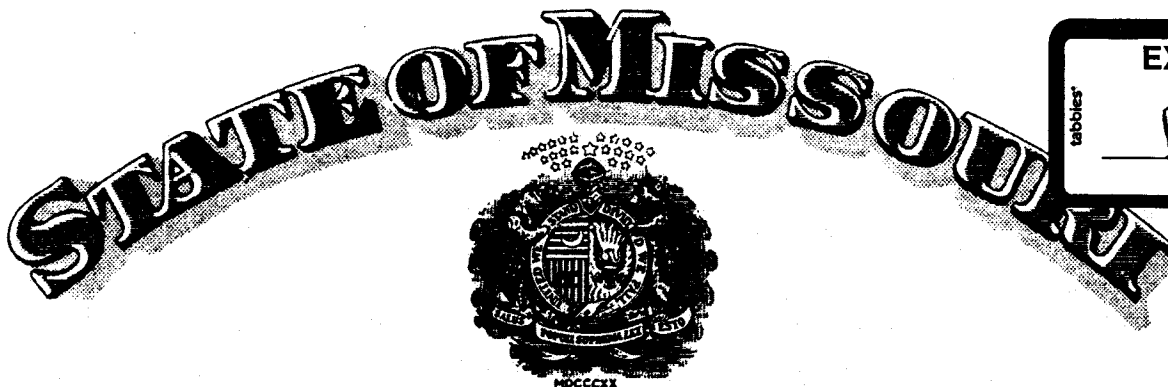
You may request a hearing in this matter. You may do so by filing a complaint with the Administrative Hearing Commission of Missouri, P.O. Box 1557, Jefferson City, Missouri within 30 days after the mailing of this notice pursuant to Section 621.120, RSMo.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2009, a copy of the foregoing Notice and Order was served upon the Applicant in this matter by certified mail No. 7006 0100 0005 2690 5832



Karen Crutchfield
Senior Office Support Staff



**DEPARTMENT OF INSURANCE, FINANCIAL
INSTITUTIONS AND PROFESSIONAL REGISTRATION**

P.O. Box 690, Jefferson City, Mo. 65102-0690

BUSINESS RECORDS AFFIDAVIT

Before me, the undersigned authority, personally appeared Brenda Otto who, being by me duly sworn, deposed as follows:

My name is Brenda Otto, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of the Licensing Section of the Missouri Department of Insurance, Financial Institutions and Professional Registration ("Department"). Attached hereto are thirty-two (32) pages of records from the Licensing Section of the Department. These documents attached hereto consist of all of the documents the Department has in its possession pertaining to the Uniform Application for Individual Insurance Producer License filed by Clayton Lee Hoelscher. These thirty-two (32) pages of records are kept by the Licensing Section of the Department in the regular course of business, and it was the regular course of business of the Licensing Section of the Department for an employee or representative of the Licensing Section of the Department with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis. The records attached hereto are exact duplicates of the original.

Brenda Otto

Brenda Otto, Acting Manager



In witness whereof I have hereunto subscribed my name and affixed my official seal this 10th day of September, 2009.



Kathryn Randolph My commission expires: March 4, 2012



State of Missouri

DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS & PROFESSIONAL REGISTRATION

IN THE MATTER OF:

Clayton L. Hoelscher,

Applicant.

Serve At:

37 Picardy Drive

Lake St. Louis, Missouri 63367

Case No. 09-0702589C

REFUSAL TO ISSUE INSURANCE PRODUCER LICENSE

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6. Hoelscher was released from prison on April 28, 1995.

CONCLUSIONS OF LAW

7. Section 375.141.1, RSMo (Supp. 2008), provides:

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- (6) Having been convicted of a felony or crime involving moral turpitude;

* * *

- (8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere;

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8. A crime involving "moral turpitude" is a crime involving "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything 'done contrary to justice, honesty, modesty, and good morals'." *In re Frick*, 694 S.W.2d 473, 479 (Mo. banc 1985).
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13. The Director has considered the history of Hoelscher and all the circumstances surrounding Hoelscher's Application. Hoelscher's criminal history indicates a substantial risk to the public should Hoelscher receive an insurance producer license, as licensed producers must be worthy of trust. Hoelscher was convicted of felony that was also a crime of moral turpitude and included an element of fraud. Licensure of Hoelscher would not be in the public interest, and, accordingly, the Director exercises his discretion to refuse to issue Hoelscher an insurance producer license.

14. This order is in the public interest.

ORDER

IT IS THEREFORE ORDERED that the insurance producer license of Clayton L. Hoelscher is hereby summarily **REFUSED**.

SO ORDERED.

WITNESS MY HAND THIS 24th DAY OF JULY, 2009.




JOHN M. HUFF
DIRECTOR

NOTICE

TO: Applicant and any unnamed persons aggrieved by this Order:

You may request a hearing in this matter. You may do so by filing a complaint with the Administrative Hearing Commission of Missouri, P.O. Box 1557, Jefferson City, Missouri within 30 days after the mailing of this notice pursuant to Section 621.120, RSMo.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2009, a copy of the foregoing Notice and Order was served upon the Applicant in this matter by certified mail No. 1006 0100 0005 2690 5832

Karen Crutchfield
Karen Crutchfield
Senior Office Support Staff

ADDITIONAL COMMENTS

Individual/Agency Name : HOELSCHER CLAYTON LEE

Identification #: 498-60-4869

Date: 05/22/09

ELSIE

YES TO #39-1

Original received date: 05/22/09

Date additional info requested by fax or additional info request:

Date additional info was received:

Application complete date: 05/28/09

Date paperwork was sent to SI: 05/28/09

Please note the application may be revised on a bi-annual basis. To ensure you are filing the current version of the application, please reference the National Insurance Producer Registry web site at www.nipr.com.



**Uniform Application for
Individual Insurance Producer License**
(Please Print or Type)

Check appropriate box for license requested.

☒ Resident License

☐ Non-Resident License

Identify Home State: _____

Identify Home State License #: _____

000735

RECEIVED
MAY 22 2009

DEPT OF INSURANCE
FINANCIAL INSTITUTIONS &
PROFESSIONAL REGISTRATION

Demographic Information											
① Soc. Security Number <div style="font-size: 1.2em;">498-60-4869</div>				② If assigned, National Producer Number (NPN)							
③ If applicable, NASD Individual Central Registration Depository (CRD) Number				④ Are you affiliated with a financial institution/bank? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>							
⑤ Last Name HOELSCHER			JR/SR. etc		⑥ First Name CLAYTON		⑦ Middle Name LEE		⑧ Date of Birth (month) 10 (day) 22 (year) 1955		
⑨ Residence/Home Address (Physical Street) 37 PICARDY DR.				⑩ P.O. Box		⑪ City LAKE ST LOUIS		⑫ State MO		⑬ Zip Code 63367	
⑮ Home Phone Number (636) 561-3958		⑯ Gender (Circle One) <input checked="" type="radio"/> Male <input type="radio"/> Female		⑰ Are you a Citizen of the United States? (Check One) Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> (If No, of which country are you a citizen?) (If No, you must supply proof of eligibility to work in the U.S.)							
⑱ Business Entity Name											
⑲ Business Address (Physical Street)				⑳ P.O. Box		㉑ City		㉒ State		㉓ Zip Code	
㉔ Business Phone Number (include extension)				㉕ Business Fax Number		㉖ Business E-Mail Address			㉗ Business Web Site Address		
㉘ Applicant's Mailing Address 37 PICARDY DR.				㉙ P.O. Box		㉚ City LAKE ST LOUIS		㉛ State MO		㉜ Zip Code 63367	
㉝ a. List any other assumed, fictitious, alias, maiden or trade names which you have used in the past.											
b. List any trade names under which you are currently doing business or intend to do business.											
Agency or Business Entity Affiliations											
㉞ List your Insurance Agency Affiliations: (Complete only if the applicant is to be licensed as an active member of the business entity)											
FEIN _____				NPN _____		Name of Agency _____					
FEIN _____				NPN _____		Name of Agency _____					
FEIN _____				NPN _____		Name of Agency _____					
Employment History											
㉟ Account for all time for the past five years. Give all employment experience starting with your current employer working back five years. Include full and part-time work, self-employment, military service, unemployment and full-time education.											
					From Month Year		To Month Year		Position Held		
Name TRI-STATE WATER TREATMENT, INC.					MAR 2004		MAR 2009		SALES		
City FENTON State MO Foreign Country											
Name MID AMERICA QUALITY WATER, INC.					DEC 1998		MAR 2004		SALES		
City KAISER State MO Foreign Country											
Name											
City State Foreign Country											
Name											
City State Foreign Country											
(State Use)											

Please note the application may be revised on a bi-annual basis. To ensure you are filing the current version of the application, please reference the National Insurance Producer Registry web site at www.nipr.com.



Uniform Application for Individual Insurance Producer License

Jurisdiction and Type of License Requested

38 Next to each jurisdiction, check the license type(s) and line(s) of authority for which you are applying.

License Types: A – Agent B – Broker P – Producer SLP – Surplus Lines Producer

Lines of Authority: V – Variable L – Life H – Accident & P – Property C – Casualty PL – Personal Lines
 Life/Variable Annuity Health or Sickness

Limited Lines: Credit– Credit CR – Car Rental CROP – Crop T – Travel S – Surety O – Other: Specify Type

Jurisdiction	License Type				Major Lines of Authority						Limited Lines of Authority					
	A	B	P	SLP	V	L	H	P	C	PL	Credit	CR	CROP	T	S	O
AK																
AL																
AR																
AZ																
CA																
CO																
CT																
DC																
DE																
FL																
GA																
GU																
HI																
IA																
ID																
IL																
IN																
KS																
KY																
LA																
MA																
MD																
ME																
MI																
MN																
MO			✓			✓	✓									
MS																
MT																
NC																
ND																
NE																
NH																
NJ																
NM																
NV																
NY																
OH																
OK																
OR																
PA																
PR																
RI																
SC																
SD																
TN																
TX																
UT																
VI																
VA																
VT																
WA																
WI																
WV																
WY																

Please note the application may be revised on a bi-annual basis. To ensure you are filing the current version of the application, please reference the National Insurance Producer Registry web site at www.nipr.com



Uniform Application for Individual Insurance Producer License

Background Information

19 The Applicant must read the following very carefully and answer every question. All copies of documents must be certified. All written statements submitted by the Applicant must include an original signature.

1. Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime? Yes ☒ No ☐
 "Crime" includes a misdemeanor, felony or a military offense. You may exclude misdemeanor traffic citations or convictions involving driving under the influence (DUI) or driving while intoxicated (DWI), driving without a license, reckless driving, or driving with a suspended or revoked license and juvenile offenses. "Convicted" includes, but is not limited to, having been found guilty by verdict of a judge or jury, having entered a plea of guilty or nolo contendere, or having been given probation, a suspended sentence or a fine.

If you answer yes, you must attach to this application:

- a) a written statement explaining the circumstances of each incident,
- b) a certified copy of the charging document,
- c) a certified copy of the official document, which demonstrates the resolution of the charges or any final judgment.

If you have a felony conviction, have you applied for a waiver as required by 18 USC 1033? N/A ☐ Yes ☐ No ☒

If so, was that waiver granted? (Attach copy of 1033 waiver approved by home state.) N/A ☒ Yes ☐ No ☐

2. Have you or any business in which you are or were an owner, partner, officer or director, or member or manager of limited liability company, ever been involved in an administrative proceeding regarding any professional or occupational license, or registration? Yes ☐ No ☒

"Involved" means having a license censured, suspended, revoked, canceled, terminated; or, being assessed a fine, a cease and desist order, a prohibition order, a compliance order, placed on probation or surrendering a license to resolve an administrative action. "Involved" also means being named as a party to an administrative or arbitration proceeding, which is related to a professional or occupational license. "Involved" also means having a license application denied or the act of withdrawing an application to avoid a denial. You may EXCLUDE terminations due solely to noncompliance with continuing education requirements or failure to pay a renewal fee.

If you answer yes, you must attach to this application:

- a) a written statement identifying the type of license and explaining the circumstances of each incident,
- b) a certified copy of the Notice of Hearing or other document that states the charges and allegations, and
- c) a certified copy of the official document, which demonstrates the resolution of the charges or any final judgment.

3. Has any demand been made or judgment rendered against you or any business in which you are or were an owner, partner, officer or director, or member or manager of limited liability company, for overdue monies by an insurer, insured or producer, or have you ever been subject to a bankruptcy proceeding? Only include bankruptcies that involve funds held on behalf of others. Yes ☐ No ☒

If you answer yes, submit a statement summarizing the details of the indebtedness and arrangements for repayment, and/or type and location of bankruptcy.

4. Have you been notified by any jurisdiction to which you are applying of any delinquent tax obligation that is not the subject of a repayment agreement? Yes ☐ No ☒

If you answer yes, identify the jurisdiction(s): _____

5. Are you currently a party to, or have you ever been found liable in, any lawsuit or arbitration proceeding involving allegations of fraud, misappropriation or conversion of funds, misrepresentation or breach of fiduciary duty? Yes ☐ No ☒

If you answer yes, you must attach to this application:

- a) a written statement summarizing the details of each incident,
- b) a certified copy of the Petition, Complaint or other document that commenced the lawsuit or arbitration, and
- c) a certified copy of the official document, which demonstrates the resolution of the charges or any final judgment.

6. Have you or any business in which you are or were an owner, partner, officer or director, or member or manager of limited liability company, ever had an insurance agency contract or any other business relationship with an insurance company terminated for any alleged misconduct? Yes ☐ No ☒

If you answer yes, you must attach to this application:

- a) a written statement summarizing the details of each incident and explaining why you feel this incident should not prevent you from receiving an insurance license, and
- b) certified copies of all relevant documents.

7. Do you have a child support obligation in arrears? Yes ☐ No ☒

If you answer yes,

- a) by how many months are you in arrears? _____ Months
- b) are you currently subject to a repayment agreement? Yes ☐ No ☐
- c) are you the subject of a child support related subpoena/warrant? Yes ☐ No ☐

Please note the application may be revised on a bi-annual basis. To ensure you are filing the current version of the application, please reference the National Insurance Producer Registry web site at www.nipr.com.



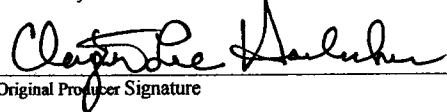
Uniform Application for Individual Insurance Producer License

Applicant's Certification and Attestation

④ The Applicant must read the following very carefully:

1. I hereby certify that, under penalty of perjury, all of the information submitted in this application and attachments is true and complete. I am aware that submitting false information or omitting pertinent or material information in connection with this application is grounds for license revocation or denial of the license and may subject me to civil or criminal penalties.
2. Where required by law, I hereby designate the Commissioner, Director or Superintendent of Insurance, or other appropriate party in each jurisdiction for which this application is made to be my agent for service of process regarding all insurance matters in the respective jurisdiction and agree that service upon the Commissioner, Director or Superintendent of Insurance, or other appropriate party of that jurisdiction is of the same legal force and validity as personal service upon myself.
3. I further certify that I grant permission to the Commissioner, Director or Superintendent of Insurance, or other appropriate party in each jurisdiction for which this application is made to verify information with any federal, state or local government agency, current or former employer, or insurance company.
4. I further certify that, under penalty of perjury, a) I have no child-support obligation, b) I have a child-support obligation and I am currently in compliance with that obligation, or c) I have identified my child support obligation arrearage on this application.
5. I authorize the jurisdictions to give any information concerning me, as permitted by law, to any federal, state or municipal agency, or any other organization and I release the jurisdictions and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.
6. I acknowledge that I understand and will comply with the insurance laws and regulations of the jurisdictions to which I am applying for licensure.
7. For Non-Resident License Applications, I certify that I am licensed and in good standing in my home state/resident state for the lines of authority requested from the non-resident state.
8. As part of the resident licensing process pursuant to applicable state law, resident applicant acknowledges that the submission of his or her fingerprint record will be submitted to a secured centralized repository maintained by the National Association of Insurance Commissioners ("NAIC") as authorized by the state insurance department pursuant to a memorandum of understanding between participating state insurance departments and the NAIC. The resident applicant acknowledges the fingerprint record will be stored at the NAIC and transmitted to law enforcement agencies for the purpose of determining Applicant's qualification for licensure. *(Applicable only to residents of Alaska)*

MAY 18, 2009
Month/Day/Year


Original Producer Signature

CLAYTON LEE HORLSCHER
Full Legal Name (Printed or Typed)

Attachments

④ The following attachments must accompany the application otherwise the application may be returned unprocessed or considered deficient.

1. For Non-Resident License Applications and unless otherwise noted in the State Matrix of Business Rules, a state will rely on an electronic verification of an Applicant's resident license through the NAIC's State Producer Licensing Database in lieu of requiring an original Letter of Certification from the resident state.
2. Any jurisdiction specific attachments listed in the State Matrix of Business Rules (www.nipr.com).

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Missouri Department of Insurance

CAT2616



Clayton L Hoelscher

37 Picardy Dr

Lake St Louis

MO 63367

Date of Birth: 10/22/1955

Candidate ID: CH813104

SSN: XXX-XX-4869

Exam Date: 4/30/2009

Result: **PASS**

Exam: **Life Accident and Health Insurance Producer**

Congratulations on passing your examination! You are now eligible to apply to the Department for a license.

After the Department has verified that you have passed the required exam and that you have nothing in your background that should prohibit you from being licensed, the Department will issue the appropriate license. Once you have been issued a license, you will be required to renew it on a periodic basis.

To apply for a license, you must submit:

- A completed NAIC Uniform Application for Resident Individual Insurance Producer License, available at: <http://www.nipr.com/>
 - The appropriate license fee
 - The license fee must be submitted with your completed application and must be in the form of a company/agency check, cashier's check or money order. Personal checks and cash are not accepted.
 - The state of Missouri strongly encourages applicants for insurance producer license to apply for such license electronically via the National Insurance Producer Registry (NIPR), an NAIC business partner. Steps to apply electronically can be found at <http://nipr.com/> under Products and Services.
- Application fees may be charged to a credit card.

IMPORTANT: You **must** submit your license application to the Department within **one (1) year** of passing your exam. If more than one year has lapsed since you passed your licensing exam, you must retake and pass the exam again.

5/18/09

AS THE OWNER OF A BAR AND RESTAURANT, I BECAME INVOLVED WITH A REGULAR CUSTOMER NAMED MIKE SALSMAN. MR. SALSMAN WAS INVOLVED IN THE SALE OF COCAINE AND CONVINCED ME TO PARTICIPATE TO MAKE SOME "EASY MONEY" TO BAIL OUT MY FAILING BUSINESS. AN INFORMANT TURNED IN MR. SALSMAN AND AT LEAST EIGHT OTHERS INCLUDING MYSELF. SINCE THIS OCCURRED IN 1989, I HAVE DONE NOTHING OF A CRIMINAL NATURE SINCE AND NEVER PLAN TO DO SO AGAIN. I WOULD APPRECIATE THE OPPORTUNITY TO HELP PEOPLE WITH THEIR INSURANCE NEEDS.

Thank You,

Clayton Hockley

FILED**United States District Court**

NOV 13 1989

EASTERN

District of

MISSOURI

EYVON MENDENHALL
U. S. DISTRICT COURT
E. DISTRICT OF MO.

UNITED STATES OF AMERICA

V.

**JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT**

CLAYTON HOELSCHER

Case Number S1-89-46CR(5)

(Name of Defendant)

Scott Rosenblum

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____.
- ☒ was found guilty on count(s) one after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21:841(a)(1)	Distribution and possession with intent to distribute cocaine.	1

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
- ☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
- ☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
- ☒ It is ordered that the defendant shall pay to the United States a special assessment of \$ 50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

498-60-4869

Defendant's mailing address:

37 PicardyLake St. Louis, MO 63367

Defendant's residence address:

Same as above

November 13, 1989

Date of Imposition of Sentence

Stephen N. Limbaugh
Signature of Judicial Officer
JAMES G. LIMBAUGH, CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

November 13, 1989

BY: _____ Date

DEPUTY CLERK

Defendant: Clayton Hoelscher
Case Number: S1-89-46CR(5)

Judgment—Page 2 of 5**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of seventy eights months.

It is ordered that any time spent in Federal Custody on this charge shall be applied to this sentence of imprisonment.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m.
_____ p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

Defendant: Clayton Hoelscher
Case Number: S1-89-46CR(5)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of _____
four years

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: Clayton Hoelscher
Case Number: S1-89-46CR(5)

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

- 15) The defendant shall not receive, possess or transport any firearm, ammunition, explosive device or any other dangerous weapon.

Judgment—Page 5 of 5

Defendant: Clayton Hoelscher
Case Number: S1-89-46CR(5)

**RESTITUTION, FORFEITURE, OR
OTHER PROVISIONS OF THE JUDGMENT**

It is ordered that the defendant shall participate in a substance abuse program as directed by the U.S. Probation Office.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

APR 26 1989

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL SALSMAN,

JOSEPH HAAG,

ALFRED GIUFFRIDA,

DIANNA BILYEU,

MICHAEL MOIT,

STEVEN CARL MCGIRT,

MICKIE JAMES MERIWETHER,

CLATYON HOELSCHER,

DONALD MANTRO,

Defendants.

EYVON MENDENHALL
U. S. DISTRICT COURT
E. DISTRICT OF MO.

No. 81-89-46 CR(5)

COUNT I

The Grand Jury charges:

Beginning in 1985 and continuing up through
February 15, 1989, in the Eastern District of Missouri and
elsewhere, the defendants

MICHAEL SALSMAN,
JOSEPH HAAG,
ALFRED GIUFFRIDA,
DIANNA BILYEU,
MICHAEL MOIT,
STEVEN CARL MCGIRT,
MICKIE JAMES MERIWETHER,
CLAYTON HOELSCHER,
DONALD MANTRO,

did knowingly and willfully combine, conspire, confederate and
agree among themselves and others known and unknown to this Grand
Jury to distribute and possess with intent to distribute cocaine,
a Schedule II narcotic drug controlled substance, in violation of
Title 21, United States Code, Section 841(a)(1).

THE PURPOSE OF THE CONSPIRACY

1. It was the purpose of the conspiracy that during the period of the conspiracy the defendant MICHAEL SALSMAN would and did obtain cocaine from various sources in Florida, New York, Arizona, Illinois, Missouri, California and elsewhere.

2. It was further the purpose of the conspiracy that defendants JOSEPH HAAG, ALFRED GIUFFRIDA, STEVEN CARL MCGIRT and MICKIE JAMES MERIWETHER and others would and did assist defendant MICHAEL SALSMAN in obtaining cocaine.

3. It was further the purpose of the conspiracy that defendants JOSEPH HAAG, ALFRED GIUFFRIDA, DIANNA BILYEU, MICHAEL MOIT, CLAYTON HOELSCHER, DONALD MANTRO and others would and did assist the defendant MICHAEL SALSMAN in the distribution of cocaine.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants and others committed the following overt acts, among others, in the Eastern District of Missouri and elsewhere:

1. During April, 1986, the defendant MICHAEL SALSMAN attempted to purchase cocaine in Florida.

2. During July, 1986, the defendant MICHAEL SALSMAN distributed a quantity of cocaine in Iowa.

3. During August, 1986, the defendant MICHAEL SALSMAN purchased cocaine in Florida for distribution in the Eastern District of Missouri and elsewhere.

4. During October, 1986, the defendant MICHAEL SALSMAN

purchased cocaine in Florida for distribution in the Eastern District of Missouri and elsewhere.

5. During January, 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in Illinois for distribution in the Eastern District of Missouri and elsewhere.

6. In early 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in New York for distribution in the Eastern District of Missouri and elsewhere.

7. Again in early 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in New York for distribution in the Eastern District of Missouri and elsewhere.

8. In March, 1987, the defendant MICHAEL SALSMAN attempted to purchase cocaine in Arizona.

9. In April, 1987, the defendant MICHAEL SALSMAN purchased cocaine in Arizona for distribution in the Eastern District of Missouri and elsewhere.

10. In the Spring of 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in Arizona for distribution in the Eastern District of Missouri and elsewhere.

11. Again in the Spring of 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in Arizona for distribution in the Eastern District of Missouri and elsewhere.

12. In July, 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in New Jersey for distribution in the Eastern District of Missouri and elsewhere.

13. On or about December 9, 1987, in the Eastern

District of Missouri the defendant MICHAEL SALSMAN causes approximately one ounce of cocaine to be distributed as alleged in Count II of this indictment.

14. During early November 1988 in the Eastern District of Missouri, the defendant Donald Mantro gave the defendant MICHAEL SALSMAN a sum of money for cocaine.

15. On or about November 17, 1988, in the Eastern District of Missouri the defendant ALFRED GIUFFRIDA distributed cocaine to defendant MICHAEL SALSMAN.

16. On or about November 17, 1988, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed cocaine to defendant MICHAEL MOIT who assisted defendant MICHAEL SALSMAN in dividing the cocaine for distribution to other individuals.

17. On or about November 18, 1988 in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed a quantity of cocaine to the defendant CLAYTON HOELSCHER.

18. On or about December 10, 1988, in the Eastern District of Missouri, the defendant ALFRED GIUFFRIDA distributed cocaine to defendant MICHAEL SALSMAN.

19. On or about November 21, 1988, in the Eastern

District of Missouri, the defendant CLAYTON HOELSCHER gave the defendant MICHAEL SALSMAN a sum of money for cocaine.

20. On or about December 10, 1988, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed cocaine to defendant MICHAEL MOIT who assisted defendant MICHAEL SALSMAN in dividing the cocaine for distribution to other individuals.

21. On or about December 11, 1988, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed a quantity of cocaine to the defendant DONALD MANTRO.

22. On or about December 15, 1988, in the Eastern District of Missouri, the defendant CLAYTON HOELSCHER paid the defendant MICHAEL SALSMAN a sum of money for cocaine.

23. On or about January 13, 1989, in the Eastern District of Missouri, the defendant ALFRED GIUFFRIDA distributed cocaine to the defendant MICHAEL SALSMAN.

24. On or about December 17, 1988, in the Eastern District of Missouri, the defendant DONALD MANTRO paid the defendant MICHAEL SALSMAN a sum of money for cocaine.

25. On or about January 13, 1989, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed cocaine to defendant MICHAEL MOIT who assisted defendant MICHAEL SALSMAN in dividing the cocaine for distribution to other individuals.

26. On or about January 14, 1989, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed cocaine to the defendant CLAYTON HOELSCHER.

27. On or about January 24, 1989, in the Eastern District of Missouri, the defendant CLAYTON HOELSCHER paid money to the defendant MICHAEL SALSMAN for cocaine.

28. On or about January 30, 1989, in the Eastern District of Missouri, the defendants CLAYTON HOELSCHER and MICHAEL SALSMAN discussed a cocaine transaction.

29. In early February, 1989, in the Eastern District of Missouri, the defendant ALFRED GIUFFRIDA gave money to defendant MICHAEL SALSMAN to purchase cocaine.

30. In early February, 1989, as alleged in Count III, the defendants MICHAEL SALSMAN, JOSEPH HAAG and STEVEN CARL MCGIRT travelled from the Eastern District of Missouri to Los Angeles, California to purchase cocaine.

31. On or about February 4, 1989, in the Eastern District of Missouri, defendant DONALD MANTRO paid money to the defendant MICHAEL SALSMAN for cocaine.

32. On or about February 12, 1989 in Los Angeles, California, the defendant MICKIE JAMES MERIWETHER distributed cocaine to a person who was acting for and on behalf of defendants MICHAEL SALSMAN, JOSEPH HAAG, ALFRED GIUFFRIDA and STEVEN CARL MCGIRT.

33. On or about February 4, 1989, in the Eastern District of Missouri, the defendant CLAYTON HOELSCHER paid a sum of money to the defendant MICHAEL SALSMAN for cocaine.

34. On or about February 15, 1989, in the Eastern District of Missouri, the defendants MICHAEL SALSMAN and JOSEPH HAAG did possess cocaine with intent to distribute as alleged in Count IV of this indictment.

35. On or about February 15, 1989, in the Eastern District of Missouri, the defendants MICHAEL SALSMAN and JOSEPH HAAG did cause the distribution of cocaine to defendants ALFRED GIUFFRIDA and DIANNA BILYEU as alleged in Count V of this indictment.

36. On or about February 15, 1989, in the Eastern District of Missouri, the defendants ALFRED GIUFFRIDA and DIANNA BILYEU did possess cocaine with intent to distribute as alleged in Count VI of this indictment.

All in violation of Title 21, United States Code,

Sections 841(a)(1), 841(b)(1)(B)(ii)(II) and 846.

COUNT II

The Grand Jury further charges:

On or about December 9, 1987, in St. Charles County,
the defendant

MICHAEL SALSMAN

did knowingly and intentionally distribute approximately one
ounce of cocaine, a Schedule II narcotic drug controlled
substance.

In violation of Title 21, United States Code,
Sections 841(a)(1) and 841(b)(1)(C).

COUNT III

The Grand Jury further charges:

Between on or about February 6, 1989 and February 9,
1989, the defendants

MICHAEL SALSMAN,
JOSEPH HAAG, and
STEVEN CARL MCGIRT,

did knowingly and intentionally travel in interstate commerce
from St. Louis County, Missouri, in the Eastern District of
Missouri to Los Angeles, California with the specific intent to
promote, manage, establish, carry on or facilitate the promotion,
management, establishment and carrying on of an unlawful activity
namely the conspiracy to distribute and possess with intent to
distribute cocaine, a Schedule II narcotic drug and thereafter in
California the defendants did purchase and cause the purchase of
6.6 pounds of cocaine for distribution in St. Louis, Missouri, in

the Eastern District of Missouri.

In violation of Title 18, United States Code,
Section 1952(a)(3).

COUNT IV

The Grand Jury further charges:

On or about February 15, 1989, in St. Louis County, in
the Eastern District of Missouri, the defendants

JOSEPH HAAG and
MICHAEL SALSMAN,

did knowingly possess with specific intent to distribute
approximately 2.2 pounds of cocaine, a Schedule II narcotic drug
controlled substance.

In violation of Title 21, United States Code,
Sections 841(a)(1) and 841(b)(1)(B)(ii)(II).

COUNT V

The Grand Jury further charges:

On or about February 15, 1989, in St. Louis County, in
the Eastern District of Missouri, the defendants

MICHAEL SALSMAN and
JOSEPH HAAG,

did knowingly and intentionally distribute and cause to be
distributed approximately 4.4 pounds of cocaine, a Schedule II
narcotic drug controlled substance.

In violation of Title 21, United States Code,
Sections 841(a)(1), 841(b)(1)(B)(ii)(II) and Title 18, United
States Code, Section 2.

COUNT VI

The Grand Jury further charges:

On or about February 15, 1989, in St. Louis County, in the Eastern District of Missouri, the defendants

ALFRED GIUFFRIDA and
DIANA BILYEU,

did knowingly possess with specific intent to distribute approximately 4.4 pounds of cocaine, a Schedule II narcotic drug controlled substance.

In violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(ii)(II).

COUNT VII

The Grand Jury charges:

Beginning in 1985, the exact date unknown to this Grand Jury and continuing to and including February 15, 1989, in the Eastern District of Missouri and elsewhere, the defendant

MICHAEL SALSMAN,

did knowingly and willfully engage in a continuing criminal enterprise in that the defendant MICHAEL SALSMAN did knowingly and willfully violate subchapter I of the Drug Abuse Control Act of 1970, and the Anti Abuse Act of 1986, which violations include, but are not limited to those set forth in Counts I, II, IV, V and VI of this indictment, and overt acts 2-7, 9-13, 15-18, 20-21, 23, 25-26, 34-35 of Count I, which are incorporated herein

by reference, were part of a continuing series of violations of said statutes; and the defendant MICHAEL SALSMAN did undertake the series of violations described above in concert with five or more people with respect to whom the defendant MICHAEL SALSMAN occupied a position of organizer, supervisor, or manager; and the defendant MICHAEL SALSMAN obtained substantial resources from the continuing series of violations described above and in this indictment to which the United States is entitled to forfeiture including all profits obtained by the defendant MICHAEL SALSMAN arising from his participation in such enterprise and any of his interest, property, contractual rights of any kind affording a source of influence over such enterprise including but not limited to, the following assets:

FORFEITURE

REAL PROPERTY AT 815 MASSMAN
LANE, WRIGHT CITY, MISSOURI,
further described as follows:

A tract of land being part of
the Southwest Quarter of the
Southeast Quarter of Section
23, and part of the Northwest
Quarter of the Northeast
Quarter of Section 26, all in
township 47 North, Range 1
West, Warren County, Missouri,
as described according to
General Warranty Deed Filed
and recorded in Book 429, Pages
186, 187 and 188 on the Warren
County records;

REAL PROPERTY AT PINCKNEY AND
BOONSLICK ROADS IN WARRENTON,
MISSOURI, further described as:

All of that part of the
Northeast quarter of the
Northeast quarter of Section
Twenty-nine (29), Township
Forty-seven (47) North, Range
Two (2) West, included in the
following metes and bounds,
to-wit:

Commencing at a point just west
of the west approach to the
bridge across Big Creek in the
western portion of the City of
Warrenton, Missouri, where the
north line of the Pinckney Road
meets with the south line of

the Boonslick Road; thence westwardly with the said south line of the said Boonslick Road 194 feet to corner; thence South 179 feet to corner on the north line of said Pinckney Road; thence Eastwardly with said north line of said Pinckney Road 218 feet to the point of beginning.

Except 0.27 of an acre conveyed to State of Missouri of record in Book 90 Page 471, Warren County Recorder's Office; and

REAL PROPERTY ON SCHEUTZEN GROUND ROAD IN WARRENTON, MISSOURI, further described as follows:

A tract of land being part of the Southwest quarter of the Southwest quarter of Section 25, Township 47 North, Range 2 West, and described as follows:

Beginning at a railroad spike set in the county road at the southwest corner of said Section 25; thence along the south line of said Southwest quarter, South $88^{\circ} 33' 19''$ East 690.00 feet to a point on the south line of said Southwest quarter of the Southwest quarter; thence due North 250.00 feet; thence North $88^{\circ} 33' 19''$ West 215.00 feet; thence North $62^{\circ} 16' 54''$ West 112.93 feet; thence North $88^{\circ} 33' 19''$ West 375.00 feet to a point in the west line of said Southwest quarter of the Southwest quarter; thence along said west line due South 300.00 feet to the place of beginning.

ALSO, a tract of land being part of the Southwest quarter of the Southwest quarter of section 25, Township 47 North, Range 2 West, and described and follows:

Commencing at a railroad spike set in the county road at the southwest corner of said Section 25; thence along the west line of said Southwest quarter due North 300.00 feet to the place of beginning of the tract of land herein described; thence continuing along said west line due North 116.79 feet; thence leaving said west line South 88° 33' 19" East 690.00 feet; thence due South 166.79 feet to a point which is the northeast corner of a 4.45 acre tract described in deed recorded in Book 161, page 315, Warren County Deed Records; thence along the north line of said 4.45 acre tract North 88° 33' 19" West 215.00 feet; thence North 62° 16' 54" West 112.93 feet; thence North 88° 33' 19" West 375.00 feet to the northwest corner of said 4.45 acre tract and being the place of beginning of the tract described herein;

1977 WINNEBAGO MOTOR HOME,
VEHICLE IDENTIFICATION NUMBER
M40CA7T001619;

CLAIM NUMBER 027-88-30738
ON GENERAL CASUALTY INSURANCE
CO. OF WISCONSIN POLICY NUMBER
HO-2039829;

1979 CASE LOADER, MODEL NUMBER
1450, SERIAL NUMBER 8380723.

All in violation of Title 21, United States Code,
Section 848.

COUNT VIII

The Grand Jury further charges:

On or about October 26, 1987, in the Eastern District
of Missouri, the defendant

MICHAEL SALSMAN,

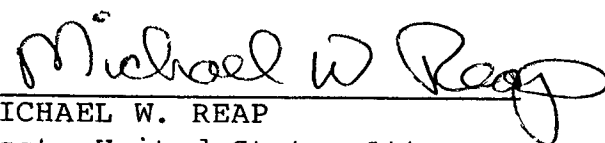
a resident of Warren County, Missouri did knowingly and wilfully
make and subscribe a 1986 Joint United States Individual Income
Tax Return 1040 form, which was verified by a written declaration
that it was made under the penalties of perjury and was filed
with the Internal Revenue Service which said 1986 Joint United
States Individual Income Tax Return 1040 form, the defendant did
not believe to be true and correct as to every material matter in
that the above Tax Return was false in its declaration of
\$328,400.00 as Other Income describing it as miscellaneous income
- gambling winnings, when in truth and in fact the defendant knew
this statement to be false as said income was narcotics income.

In violation of Title 26, United States Code, Section
7206(1).

A True Bill.


FOREPERSON

THOMAS E. DITTMEIER
United States Attorney


MICHAEL W. REAP
Asst. United States Attorney

All in violation of Title 21, United States Code,
Section 848.

COUNT VIII

The Grand Jury further charges:

On or about October 26, 1987, in the Eastern District
of Missouri, the defendant

MICHAEL SALSMAN,

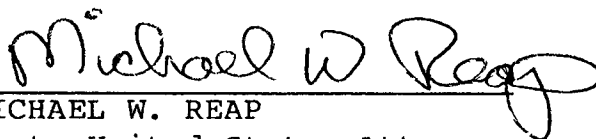
a resident of Warren County, Missouri did knowingly and wilfully
make and subscribe a 1986 Joint United States Individual Income
Tax Return 1040 form, which was verified by a written declaration
that it was made under the penalties of perjury and was filed
with the Internal Revenue Service which said 1986 Joint United
States Individual Income Tax Return 1040 form, the defendant did
not believe to be true and correct as to every material matter in
that the above Tax Return was false in its declaration of
\$328,400.00 as Other Income describing it as miscellaneous income
- gambling winnings, when in truth and in fact the defendant knew
this statement to be false as said income was narcotics income.

In violation of Title 26, United States Code, Section
7206(1).

A True Bill.


FOREPERSON

THOMAS E. DITTMEIER
United States Attorney


MICHAEL W. REAP
Asst. United States Attorney

EXHIBIT

tabbies

C

UNITED STATES DISTRICT COURT

EASTERN

District of

MISSOURI

EXEMPLIFICATION CERTIFICATE

I, JAMES G. WOODWARD, Clerk of this United States District Court, keeper of the records and seal, certify that the attached documents:

4:89-cr-00046-SNL

RECEIVED

JUDGMENT Filed 11/13/1989
INDICTMENT Filed 04/26/1989

are true copies of records of this Court.

In testimony whereof I sign my name and affix the seal of this Court, in this District, at

ST. LOUIS, MISSOURI

on

July 22, 2009

City

Date

James G. Woodward
Clerk

Deborah Tichy
(By) Deputy Clerk

I, Honorable Rodney W. Sippel, a Judicial Officer of this certify that JAMES G. WOODWARD, named above, is and was on the date Clerk of this Court, duly appointed and sworn, and keeper of the records and seal, and that this certificate, the attestation of the record, are in accordance with the laws of the United States.

Date

July 23, 2009

Signature of Judicial Officer

Rodney W. Sippel

UNITED STATES DISTRICT COURT JUDGE

Title

I, JAMES G. WOODWARD, Clerk of this United States District Court, keeper of the seal, certify that the Honorable Honorable Rodney W. Sippel,
Judicial Officer

named above, is and was on the date noted a Judicial Officer of this Court, duly appointed, sworn and qualified, and that I am well acquainted with the Judicial Officer's official signature and know and certify the above signature to be that of the Judicial Officer.

In testimony whereof I sign my name, and affix the seal of this Court at

ST. LOUIS, MISSOURI

in this State, on

July 22, 2009

City

Date

James G. Woodward
Clerk

Deborah Tichy
(By) Deputy Clerk

FILED**United States District Court**

NOV 13 1989

EASTERN

District of

MISSOURI

EYVON MENDENHALL
U. S. DISTRICT COURT,
E. DISTRICT OF MO.

UNITED STATES OF AMERICA

V.

**JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT**

CLAYTON HOELSCHER

Case Number S1-89-46CR(5)

(Name of Defendant)

Scott Rosenblum

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____ after a
☒ was found guilty on count(s) one
 plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21:841(a)(1)	Distribution and possession with distribute cocaine.	1

TRUE COPY OF THE ORIGINAL
JAMES G. WOODWARD, CLERK
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

The defendant is sentenced as provided in pages 2 through 5
 imposed pursuant to the Sentencing Reform Act of 1984.

BY this Judgment, The sentence is
DEPUTY CLERK

- ☐ The defendant has been found not guilty on count(s) _____,
 and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the
 United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of \$ 50.00,
 which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within
 30 days of any change of residence or mailing address until all fines, restitution, costs, and special
 assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

498-60-4869

Defendant's mailing address:

37 Picardy

Lake St. Louis, MO 63367

Defendant's residence address:

Same as above

November 13, 1989

Date of Imposition of Sentence

Stephen N. Limbaugh
 Signature of Judicial Officer

Stephen N. Limbaugh
 U.S. District Judge

Name & Title of Judicial Officer

November 13, 1989

Date

Defendant: Clayton Hoelscher.
Case Number: SI-89-46CR(5)

Judgment—Page 2 of 5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of seventy eights months.

It is ordered that any time spent in Federal Custody on this charge shall be applied to this sentence of imprisonment.

☐ The Court makes the following recommendations to the Bureau of Prisons:

- ☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m.
_____ p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

Defendant: Clayton Hoelscher
Case Number: S1-89-46CR(5)

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

- 15) The defendant shall not receive, possess or transport any firearm, ammunition, explosive device or any other dangerous weapon.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

APR 26 1989

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICHAEL SALSMAN,
JOSEPH HAAG,
ALFRED GIUFFRIDA,
DIANNA BILYEU,
MICHAEL MOIT,
STEVEN CARL MCGIRT,
MICKIE JAMES MERIWETHER,
CLATYON HOELSCHER,
DONALD MANTRO,

Defendants.

No. 81-89-46 CR(5)

EYVON MENDENHALL
U. S. DISTRICT COURT
E. DISTRICT OF MO.

COUNT I

The Grand Jury charges:

Beginning in 1985 and continuing up through
February 15, 1989, in the Eastern District of Missouri and
elsewhere, the defendants

MICHAEL SALSMAN,
JOSEPH HAAG,
ALFRED GIUFFRIDA,
DIANNA BILYEU,
MICHAEL MOIT,
STEVEN CARL MCGIRT,
MICKIE JAMES MERIWETHER,
CLAYTON HOELSCHER,
DONALD MANTRO,

A TRUE COPY OF THE ORIGINAL
JAMES G. WOODWARD, CLERK
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

BY:

Deborah Tilly
DEPUTY CLERK

did knowingly and willfully combine, conspire, confederate and
agree among themselves and others known and unknown to this Grand
Jury to distribute and possess with intent to distribute cocaine,
a Schedule II narcotic drug controlled substance, in violation of
Title 21, United States Code, Section 841(a)(1).

purchased cocaine in Florida for distribution in the Eastern District of Missouri and elsewhere.

5. During January, 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in Illinois for distribution in the Eastern District of Missouri and elsewhere.

6. In early 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in New York for distribution in the Eastern District of Missouri and elsewhere.

7. Again in early 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in New York for distribution in the Eastern District of Missouri and elsewhere.

8. In March, 1987, the defendant MICHAEL SALSMAN attempted to purchase cocaine in Arizona.

9. In April, 1987, the defendant MICHAEL SALSMAN purchased cocaine in Arizona for distribution in the Eastern District of Missouri and elsewhere.

10. In the Spring of 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in Arizona for distribution in the Eastern District of Missouri and elsewhere.

11. Again in the Spring of 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in Arizona for distribution in the Eastern District of Missouri and elsewhere.

12. In July, 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in New Jersey for distribution in the Eastern District of Missouri and elsewhere.

13. On or about December 9, 1987, in the Eastern

District of Missouri, the defendant CLAYTON HOELSCHER gave the defendant MICHAEL SALSMAN a sum of money for cocaine.

20. On or about December 10, 1988, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed cocaine to defendant MICHAEL MOIT who assisted defendant MICHAEL SALSMAN in dividing the cocaine for distribution to other individuals.

21. On or about December 11, 1988, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed a quantity of cocaine to the defendant DONALD MANTRO.

22. On or about December 15, 1988, in the Eastern District of Missouri, the defendant CLAYTON HOELSCHER paid the defendant MICHAEL SALSMAN a sum of money for cocaine.

23. On or about January 13, 1989, in the Eastern District of Missouri, the defendant ALFRED GIUFFRIDA distributed cocaine to the defendant MICHAEL SALSMAN.

24. On or about December 17, 1988, in the Eastern District of Missouri, the defendant DONALD MANTRO paid the defendant MICHAEL SALSMAN a sum of money for cocaine.

25. On or about January 13, 1989, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed cocaine to defendant MICHAEL MOIT who assisted defendant MICHAEL SALSMAN in dividing the cocaine for distribution to other individuals.

26. On or about January 14, 1989, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed cocaine to the defendant CLAYTON HOELSCHER.

27. On or about January 24, 1989, in the Eastern District of Missouri, the defendant CLAYTON HOELSCHER paid money to the defendant MICHAEL SALSMAN for cocaine.

28. On or about January 30, 1989, in the Eastern District of Missouri, the defendants CLAYTON HOELSCHER and MICHAEL SALSMAN discussed a cocaine transaction.

29. In early February, 1989, in the Eastern District of Missouri, the defendant ALFRED GIUFFRIDA gave money to defendant MICHAEL SALSMAN to purchase cocaine.

30. In early February, 1989, as alleged in Count III, the defendants MICHAEL SALSMAN, JOSEPH HAAG and STEVEN CARL MCGIRT travelled from the Eastern District of Missouri to Los Angeles, California to purchase cocaine.

31. On or about February 4, 1989, in the Eastern District of Missouri, defendant DONALD MANTRO paid money to the defendant MICHAEL SALSMAN for cocaine.

32. On or about February 12, 1989 in Los Angeles, California, the defendant MICKIE JAMES MERIWETHER distributed cocaine to a person who was acting for and on behalf of defendants MICHAEL SALSMAN, JOSEPH HAAG, ALFRED GIUFFRIDA and STEVEN CARL MCGIRT.

33. On or about February 4, 1989, in the Eastern District of Missouri, the defendant CLAYTON HOELSCHER paid a sum of money to the defendant MICHAEL SALSMAN for cocaine.

34. On or about February 15, 1989, in the Eastern District of Missouri, the defendants MICHAEL SALSMAN and JOSEPH HAAG did possess cocaine with intent to distribute as alleged in Count IV of this indictment.

35. On or about February 15, 1989, in the Eastern District of Missouri, the defendants MICHAEL SALSMAN and JOSEPH HAAG did cause the distribution of cocaine to defendants ALFRED GIUFFRIDA and DIANNA BILYEU as alleged in Count V of this indictment.

36. On or about February 15, 1989, in the Eastern District of Missouri, the defendants ALFRED GIUFFRIDA and DIANNA BILYEU did possess cocaine with intent to distribute as alleged in Count VI of this indictment.

All in violation of Title 21, United States Code,

the Eastern District of Missouri.

In violation of Title 18, United States Code,
Section 1952(a)(3).

COUNT IV

The Grand Jury further charges:

On or about February 15, 1989, in St. Louis County, in
the Eastern District of Missouri, the defendants

JOSEPH HAAG and
MICHAEL SALSMAN,

did knowingly possess with specific intent to distribute
approximately 2.2 pounds of cocaine, a Schedule II narcotic drug
controlled substance.

In violation of Title 21, United States Code,
Sections 841(a)(1) and 841(b)(1)(B)(ii)(II).

COUNT V

The Grand Jury further charges:

On or about February 15, 1989, in St. Louis County, in
the Eastern District of Missouri, the defendants

MICHAEL SALSMAN and
JOSEPH HAAG,

did knowingly and intentionally distribute and cause to be
distributed approximately 4.4 pounds of cocaine, a Schedule II
narcotic drug controlled substance.

In violation of Title 21, United States Code,
Sections 841(a)(1), 841(b)(1)(B)(ii)(II) and Title 18, United
States Code, Section 2.

COUNT VI

The Grand Jury further charges:

On or about February 15, 1989, in St. Louis County, in the Eastern District of Missouri, the defendants

ALFRED GIUFFRIDA and
DIANA BILYEU,

did knowingly possess with specific intent to distribute approximately 4.4 pounds of cocaine, a Schedule II narcotic drug controlled substance.

In violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(ii)(II).

COUNT VII

The Grand Jury charges:

Beginning in 1985, the exact date unknown to this Grand Jury and continuing to and including February 15, 1989, in the Eastern District of Missouri and elsewhere, the defendant

MICHAEL SALSMAN,

did knowingly and willfully engage in a continuing criminal enterprise in that the defendant MICHAEL SALSMAN did knowingly and willfully violate subchapter I of the Drug Abuse Control Act of 1970, and the Anti Abuse Act of 1986, which violations include, but are not limited to those set forth in Counts I, II, IV, V and VI of this indictment, and overt acts 2-7, 9-13, 15-18, 20-21, 23, 25-26, 34-35 of Count I, which are incorporated herein

by reference, were part of a continuing series of violations of said statutes; and the defendant MICHAEL SALSMAN did undertake the series of violations described above in concert with five or more people with respect to whom the defendant MICHAEL SALSMAN occupied a position of organizer, supervisor, or manager; and the defendant MICHAEL SALSMAN obtained substantial resources from the continuing series of violations described above and in this indictment to which the United States is entitled to forfeiture including all profits obtained by the defendant MICHAEL SALSMAN arising from his participation in such enterprise and any of his interest, property, contractual rights of any kind affording a source of influence over such enterprise including but not limited to, the following assets:

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REAL PROPERTY AT 815 MASSMAN
LANE, WRIGHT CITY, MISSOURI,
further described as follows:

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REAL PROPERTY AT PINCKNEY AND
BOONSLICK ROADS IN WARRENTON,
MISSOURI, further described as:

All of that part of the
Northeast quarter of the
Northeast quarter of Section
Twenty-nine (29), Township
Forty-seven (47) North, Range
Two (2) West, included in the
following metes and bounds,
to-wit:

Commencing at a point just west
of the west approach to the
bridge across Big Creek in the
western portion of the City of
Warrenton, Missouri, where the
north line of the Pinckney Road
meets with the south line of

All in violation of Title 21, United States Code,
Section 848.

COUNT VIII

The Grand Jury further charges:

On or about October 26, 1987, in the Eastern District
of Missouri, the defendant

MICHAEL SALSMAN,

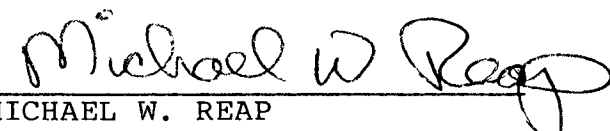
a resident of Warren County, Missouri did knowingly and wilfully
make and subscribe a 1986 Joint United States Individual Income
Tax Return 1040 form, which was verified by a written declaration
that it was made under the penalties of perjury and was filed
with the Internal Revenue Service which said 1986 Joint United
States Individual Income Tax Return 1040 form, the defendant did
not believe to be true and correct as to every material matter in
that the above Tax Return was false in its declaration of
\$328,400.00 as Other Income describing it as miscellaneous income
- gambling winnings, when in truth and in fact the defendant knew
this statement to be false as said income was narcotics income.

In violation of Title 26, United States Code, Section
7206(1).

A True Bill.


FOREPERSON

THOMAS E. DITTMEIER
United States Attorney

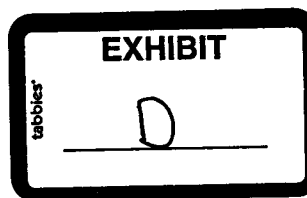

MICHAEL W. REAP
Asst. United States Attorney

Westlaw

914 F.2d 1527

914 F.2d 1527

(Cite as: 914 F.2d 1527)



Page 1

▷

United States Court of Appeals,
Eighth Circuit.
UNITED STATES of America, Appellee,
v.

Clayton HOELSCHER, Appellant.
UNITED STATES of America, Appellee,
v.

Mickie James MERIWETHER, Appellant.
UNITED STATES of America, Appellee,
v.

Joseph HAAG, Appellant.
UNITED STATES of America, Appellee,
v.

Steven Carl McGIRT, Appellant.
UNITED STATES of America, Appellee,
v.

Michael MOIT, Appellant.
UNITED STATES of America, Appellee,
v.

Alfred GIUFFRIDA, Appellant.
Nos. 89-2973 through 89-3017, 89-3064,
90-1101.

Submitted Sept. 10, 1990.

Decided Sept. 18, 1990.

Rehearing Denied Oct. 29, 1990.

Rehearing and Rehearing En Banc Denied in Nos.
89-2974 and 90-1101 Nov. 6, 1990.

Defendants were convicted in the United States District Court for the Eastern District of Missouri, Stephen Nathaniel Limbaugh, J., of various offenses arising from cocaine distribution ring, and they appealed. The Court of Appeals, Henry Woods, District Judge, sitting by designation, held that: (1) evidence was sufficient to support convictions; (2) evidence that marijuana was found in one defendant's home was admissible in prosecution for cocaine offenses; and (3) another defendant was not entitled to withdraw guilty plea to single count charging him with distribution of two kilograms of cocaine based on his alleged misunderstanding of

Sentencing Guidelines range.

Affirmed.

West Headnotes

[1] Commerce 83 ⇨ 82.10

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(J) Offenses and Prosecutions

83k82.5 Federal Offenses and Prosecutions

83k82.10 k. Offenses Involving Activity Unlawful Under State Law. Most Cited Cases

Conspiracy 91 ⇨ 47(12)

91 Conspiracy

91II Criminal Responsibility

91II(B) Prosecution

91k44 Evidence

91k47 Weight and Sufficiency

91k47(3) Particular Conspiracies

91k47(12) k. Narcotics and Dangerous Drugs. Most Cited Cases

Controlled Substances 96H ⇨ 81

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk81 k. Possession for Sale or Distribution. Most Cited Cases

(Formerly 138k123.2, 138k123(2) Drugs and Narcotics)

Evidence that defendant engaged in interstate travel to promote, establish, and carry on scheme to obtain and distribute large quantities of cocaine and that he persuaded coconspirator to make similar interstate trip was sufficient to support defendant's convictions of conspiracy to distribute cocaine, Travel Act violation, and two counts of possession of cocaine with intent to distribute. Comprehensive

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 2

Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(B)(ii)(II), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(B)(ii)(II), 846; 18 U.S.C.A. § 1952(a)(3).

[2] Conspiracy 91 ⇨ 24(1)

91 Conspiracy
 91II Criminal Responsibility
 91II(A) Offenses
 91k23 Nature and Elements of Criminal Conspiracy in General
 91k24 Combination or Agreement
 91k24(1) k. In General. Most Cited Cases

Proof of formal agreement is not necessary to prove existence of agreement as required for conspiracy; proof of common plan or tacit understanding is sufficient.

[3] Conspiracy 91 ⇨ 40.3

91 Conspiracy
 91II Criminal Responsibility
 91II(A) Offenses
 91k39 Persons Liable
 91k40.3 k. Persons Joining After Formation of Conspiracy. Most Cited Cases
 Once person joins conspiracy, he assumes full liability for a conspiracy even though he joins in later stages.

[4] Criminal Law 110 ⇨ 829(3)

110 Criminal Law
 110XX Trial
 110XX(H) Instructions: Requests
 110k829 Instructions Already Given
 110k829(3) k. Elements and Incidents of Offense. Most Cited Cases
 Trial court, which covered essentially same concept as was included in defendant's proffered cocaine conspiracy instruction indicating that mere presence at scene of drug sale does not establish conspiracy, was not required to give instruction proffered by defendant.

[5] Criminal Law 110 ⇨ 1038.2

110 Criminal Law
 110XXIV Review
 110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
 110XXIV(E)1 In General
 110k1038 Instructions
 110k1038.2 k. Failure to Instruct in General. Most Cited Cases

Criminal Law 110 ⇨ 1038.3

110 Criminal Law
 110XXIV Review
 110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
 110XXIV(E)1 In General
 110k1038 Instructions
 110k1038.3 k. Necessity of Requests. Most Cited Cases
 Merely offering requested instruction to trial judge for consideration without advancing any reason why instruction should be given or making timely specific objection to failure of court to give instruction is not sufficient to preserve error for appeal. Fed.Rules Cr.Proc.Rule 30, 18 U.S.C.A.

[6] Criminal Law 110 ⇨ 627.7(3)

110 Criminal Law
 110XX Trial
 110XX(A) Preliminary Proceedings
 110k627.5 Discovery Prior to and Incident to Trial
 110k627.7 Statements, Disclosure of
 110k627.7(3) k. Statements of Witnesses or Prospective Witnesses. Most Cited Cases
 Criminal rule requiring Government to disclose oral statements made by defendant in response to interrogation does not cover testimony by government witness regarding oral statement by conspirator in course of conspiracy. Fed.Rules Cr.Proc.Rule 16, 18 U.S.C.A.

[7] Criminal Law 110 ⇨ 1043(3)

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 3

110 Criminal Law
 110XXIV Review
 110XXIV(E) Presentation and Reservation in
 Lower Court of Grounds of Review
 110XXIV(E)1 In General
 110k1043 Scope and Effect of Objec-
 tion

110k1043(3) k. Adding to or Chan-
 ging Grounds of Objection. Most Cited Cases
 Defendant, who did not object at trial to Govern-
 ment's direct examination of coconspirator regard-
 ing defendant's statement on basis of Jencks Act vi-
 olation or for reasons of irrelevance or prejudice,
 was precluded from objecting to admission of state-
 ment on such grounds on appeal. 18 U.S.C.A. § 3500.

[8] Criminal Law 110 ⚔ 429(1)

110 Criminal Law
 110XVII Evidence
 110XVII(P) Documentary Evidence
 110k429 Public or Official Acts, Proceed-
 ings, Records, and Certificates
 110k429(1) k. In General. Most Cited
 Cases
 Defendant was not entitled to introduce actual FBI
 reports furnished to him as Jencks Act material,
 consisting of interviews with coconspirator and other
 government witnesses; defendant was permitted
 to use such material extensively on cross-ex-
 amination to elicit testimony deemed favorable to
 defendant. 18 U.S.C.A. § 3500.

[9] Criminal Law 110 ⚔ 867.12(7)

110 Criminal Law
 110XX Trial
 110XX(J) Issues Relating to Jury Trial
 110k867 Discharge of Jury Without Ver-
 dict; Mistrial
 110k867.12 Evidentiary Matters
 110k867.12(6) Other Misconduct;
 Character of Accused
 110k867.12(7) k. In General.
 Most Cited Cases

(Formerly 110k867)

Evidence of arson allegedly committed by defend-
 ant at behest of coconspirator, injected by code-
 defendant on cross-examination, did not entitle de-
 fendant to mistrial in cocaine distribution conspir-
 acy prosecution; trial judge firmly admonished jury
 that defendants were on trial only for conduct al-
 leged in indictments.

[10] Criminal Law 110 ⚔ 1999

110 Criminal Law
 110XXXI Counsel
 110XXXI(D) Duties and Obligations of Pro-
 secuting Attorneys
 110XXXI(D)2 Disclosure of Information
 110k1993 Particular Types of Informa-
 tion Subject to Disclosure
 110k1999 k. Impeaching Evidence.

Most Cited Cases

(Formerly 110k700(4), 110k700(3))
 Defendant charged with offenses arising from co-
 caine distribution conspiracy was not prejudiced by
 Government's failure to disclose that government
 witness had been paid \$1,500 by the Internal Rev-
 enue Service (IRS) for reasons which were not dis-
 closed, had received tax moratorium while acting as
 informant, and had received living expenses, and
 thus, alleged *Brady* violation did not require re-
 versal; only phase of case in which IRS had interest
 was tax evasion prosecution of codefendant, who
 plead guilty.

[11] Sentencing and Punishment 350H ⚔ 856

350H Sentencing and Punishment
 350HIV Sentencing Guidelines
 350HIV(F) Departures
 350HIV(F)3 Downward Departures
 350Hk853 Offense-Related Factors
 350Hk856 k. Defendant's Role in
 Offense. Most Cited Cases
 (Formerly 110k1295)
 Evidence established that defendant, who was con-
 victed of offenses arising from cocaine distribution
 conspiracy, was major participant in cocaine ring

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 4

and was not entitled to downward departure under Sentencing Guidelines as "minimal participant." U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

[12] Sentencing and Punishment 350H ⚡765

350H Sentencing and Punishment
 350HIV Sentencing Guidelines
 350HIV(C) Adjustments
 350HIV(C)3 Factors Decreasing Offense Level

350Hk765 k. Acceptance of Responsibility. Most Cited Cases
 (Formerly 110k1252)

Trial judge did not abuse his discretion in finding that defendant, who was convicted of offenses arising from cocaine distribution conspiracy, did not accept responsibility so as to be entitled to reduction of offense level under Sentencing Guidelines. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

[13] Sentencing and Punishment 350H ⚡780

350H Sentencing and Punishment
 350HIV Sentencing Guidelines
 350HIV(E) Prior or Subsequent Misconduct
 350Hk780 k. Grade, Degree or Classification of Other Offense. Most Cited Cases
 (Formerly 110k1245(3))

Misdemeanor convictions count in determining offense level under guidelines unless they are similar or the same as offenses listed as excludable, and assault and theft, which are not listed or similar to listed offenses, are not required to be disregarded. U.S.S.G. § 4A1.2(c)(1, 2), 18 U.S.C.A.App.

[14] Criminal Law 110 ⚡1023(11)

110 Criminal Law
 110XXIV Review
 110XXIV(C) Decisions Reviewable
 110k1021 Decisions Reviewable
 110k1023 Appealable Judgments and Orders
 110k1023(11) k. Requisites and

Sufficiency of Judgment or Sentence. Most Cited Cases

(Formerly 110k1134(3))

Claim by defendant that prior misdemeanor convictions should have been disregarded in calculating guidelines offense level was not appealable, where sentence received by defendant of 100 months was within guidelines ranges calculated either with or without convictions. U.S.S.G. § 4A1.2(c)(1, 2), 18 U.S.C.A.App.

[15] Conspiracy 91 ⚡47(12)

91 Conspiracy

91II Criminal Responsibility

91II(B) Prosecution

91k44 Evidence

91k47 Weight and Sufficiency

91k47(3) Particular Conspiracies

91k47(12) k. Narcotics and Dangerous Drugs. Most Cited Cases

Evidence, including testimony of undercover informant, was sufficient to support defendant's conviction of conspiracy to distribute cocaine; additionally, Government introduced tape recording of conversation in which defendant expressed great displeasure at competitor undercutting his cocaine price and complained about customer who was theft victim and therefore unable to pay him. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[16] Conspiracy 91 ⚡47(12)

91 Conspiracy

91II Criminal Responsibility

91II(B) Prosecution

91k44 Evidence

91k47 Weight and Sufficiency

91k47(3) Particular Conspiracies

91k47(12) k. Narcotics and Dangerous Drugs. Most Cited Cases

Evidence strongly supported single overall cocaine distribution conspiracy rather than multiple conspiracies, despite involvement of number of separate transactions, and thus, defendant was not en-

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 5

titled to multiple conspiracy instruction. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[17] Commerce 83 ⚡82.10

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(J) Offenses and Prosecutions

83k82.5 Federal Offenses and Prosecutions

83k82.10 k. Offenses Involving Activity Unlawful Under State Law. Most Cited Cases
 Evidence that, when coconspirators were unsuccessful in establishing California source for cocaine, they persuaded defendant to fly to Los Angeles and that defendant's intervention resulted in coconspirators obtaining required supply of cocaine for continuing large scale operation in St. Louis area was sufficient to establish that defendant traveled in interstate commerce to promote or facilitate promotion of unlawful activity, and thus was sufficient to support defendant's conviction of violating the Travel Act. 18 U.S.C.A. § 1952.

[18] Criminal Law 110 ⚡423(1)

110 Criminal Law

110XVII Evidence

110XVII(O) Acts and Declarations of Conspirators and Codefendants

110k423 Furtherance or Execution of Common Purpose

110k423(1) k. In General. Most Cited Cases

Tapes of statements by alleged coconspirators in cocaine distribution conspiracy indicating that defendant "wants to work again" and speculating as to whether defendant skimmed money in drug deal were admissible under exception to hearsay rule for declarations in furtherance of conspiracy. Fed.Rules Evid.Rules 104(a), 801(d)(2)(E), 28 U.S.C.A.

[19] Criminal Law 110 ⚡427(5)

110 Criminal Law

110XVII Evidence

110XVII(O) Acts and Declarations of Conspirators and Codefendants

110k427 Preliminary Evidence as to Conspiracy or Common Purpose

110k427(5) k. Weight and Sufficiency. Most Cited Cases

Statements of coconspirators are admissible if Government demonstrates by preponderance of evidence that conspiracy existed, that defendant and declarant were members of conspiracy, and that declarations were made during course of and in furtherance of conspiracy. Fed.Rules Evid.Rules 104(a), 801(d)(2)(E), 28 U.S.C.A.

[20] Criminal Law 110 ⚡369.2(7)

110 Criminal Law

110XVII Evidence

110XVII(F) Other Offenses

110k369 Other Offenses as Evidence of Offense Charged in General

110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General

110k369.2(3) Particular Offenses, Prosecutions for

110k369.2(7) k. Narcotics, Liquor, and Gaming. Most Cited Cases

Marijuana seized during search of defendant's home, at which other drug paraphernalia such as triple beam and electric scales were also found, was relevant and admissible, even though defendant was being prosecuted for cocaine distribution conspiracy.

[21] Jury 230 ⚡33(5.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(5) Challenges and Objections

230k33(5.15) k. Peremptory Challenges. Most Cited Cases (Formerly 230k33(5.1))

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 6

Government's explanation for its exercise of peremptory challenge as to one black juror that she said nothing during voir dire, that it did not like her background and youthful age, and that it generally preferred men to women in drug cases did not show *Batson* violation.

[22] Jury 230 ⇨33(5.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(5) Challenges and Objections

230k33(5.15) k. Peremptory Challenges. Most Cited Cases
 (Formerly 230k33(5.1))

District court's determination that Government's peremptory strikes of two black prospective jurors were race neutral and did not violate *Batson* was not an abuse of discretion; both prospective jurors had family members with drug problems, and one prospective juror did not even know whether previous jury case on which she had served was criminal or civil.

[23] Conspiracy 91 ⇨47(12)

91 Conspiracy

91II Criminal Responsibility

91II(B) Prosecution

91k44 Evidence

91k47 Weight and Sufficiency

91k47(3) Particular Conspiracies

91k47(12) k. Narcotics and Dangerous Drugs. Most Cited Cases

Evidence, including testimony by government's informant, was sufficient to support defendant's conviction of conspiracy to distribute cocaine; informant testified that a kilogram of cocaine was broken up and delivered to several individuals, including defendant, and that defendant later gave one coconspirator \$5,000 enclosed in money wrappers, although defendant claimed that money was repayment for loan. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. §

846.

[24] Criminal Law 110 ⇨782(5)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k782 Determination of Sufficiency of Evidence in General

110k782(5) k. Character of Evidence in General. Most Cited Cases

Trial court could refuse to give defendant's tendered instruction that, if party offers weaker evidence when stronger evidence could have been produced, evidence may be viewed with suspicion, even though Government relied on informant's testimony rather than testimony of coconspirator who pled guilty; informant had no prior record and was not drug user, no criminal charges were dismissed in return for his cooperation, and he had good memory for detail, while coconspirator had perhaps principal role in charged cocaine distribution conspiracy.

[25] Criminal Law 110 ⇨868

110 Criminal Law

110XX Trial

110XX(J) Issues Relating to Jury Trial

110k868 k. Objections and Disposition Thereof. Most Cited Cases

Criminal Law 110 ⇨923(9)

110 Criminal Law

110XXI Motions for New Trial

110k923 Competency of Jurors and Challenges

110k923(9) k. Necessity of Objections at Trial. Most Cited Cases

Defendant, who claimed that it was not until the end of eight-day cocaine distribution conspiracy trial that he recognized juror as individual who had bowled in same league as defendant several years prior to trial, waived any right to new trial or to

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 7

voir dire juror; allegation was raised for first time in motion for new trial, and defendant did not previously call purported acquaintanceship to attention of court, giving rise to possibility that defendant withheld information from court, gambling on possibility that juror would be favorable to defendant.

[26] Sentencing and Punishment 350H ⚡856

350H Sentencing and Punishment
 350HIV Sentencing Guidelines
 350HIV(F) Departures
 350HIV(F)3 Downward Departures
 350Hk853 Offense-Related Factors
 350Hk856 k. Defendant's Role in Offense. Most Cited Cases
 (Formerly 110k1295)
 Evidence supported trial court's finding that defendant's role in cocaine distribution conspiracy was not "minimal," and thus, downward departure under Sentencing Guidelines was not warranted; evidence indicated that defendant had been major distributor for drug ring and had busied himself with trying to find additional supply sources for coconspirator. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

[27] Criminal Law 110 ⚡274(3.1)

110 Criminal Law
 110XV Pleas
 110k272 Plea of Guilty
 110k274 Withdrawal
 110k274(3) Grounds for Allowance
 110k274(3.1) k. In General. Most Cited Cases
 (Formerly 110k274(3))
 Defendant was not entitled to withdraw guilty plea to single count charging him with distribution of two kilograms of cocaine based on his alleged misunderstanding that Sentencing Guidelines range would be restricted to computation based on two kilograms, even though sentence was based on guideline range for 5 to 14.9 kilograms of cocaine; defendant was told of range of punishment and that Sentencing Guidelines applied and was advised by judge at time of plea that, if his defense counsel had

given him any estimate of sentence, it was only an estimate. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

[28] Sentencing and Punishment 350H ⚡670

350H Sentencing and Punishment
 350HIV Sentencing Guidelines
 350HIV(B) Offense Levels
 350HIV(B)1 In General
 350Hk670 k. Controlled Substances in General. Most Cited Cases
 (Formerly 110k1244)
 Sentencing Guidelines range for defendant, who pled guilty to distributing two kilograms of cocaine, could be calculated based on evidence that defendant was involved in distribution of five or perhaps six kilograms of cocaine. U.S.S.G. §§ 1B1.3, 3D1.2, 18 U.S.C.A.App.

[29] Sentencing and Punishment 350H ⚡752

350H Sentencing and Punishment
 350HIV Sentencing Guidelines
 350HIV(C) Adjustments
 350HIV(C)2 Factors Increasing Offense Level
 350Hk752 k. Organizers, Leaders, Managerial Role. Most Cited Cases
 (Formerly 110k1251)
 Evidence that defendant gave coconspirator \$45,000 to buy cocaine in California and delivered cocaine with regularity to coconspirator each month was sufficient to warrant upward adjustment under Sentencing Guidelines on ground that defendant was "leader and organizer" of drug ring. U.S.S.G. § 3B1.1, 18 U.S.C.A.App.
 *1531 N. Scott Rosenblum, St. Louis, Mo., for appellant Hoelscher.

James C. Delworth, St. Louis, Mo., for appellant Meriwether.

John E. Bardgett, St. Louis, Mo., for appellant Haag.

Stephen J. Nangle, St. Louis, Mo., for appellant

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 8

McGirt.

Carl F. James, Wentzville, Mo., for appellant Moit.

Stephen H. Gilmore, St. Louis, Mo., for appellant Giuffrida.

Michael Reap, St. Louis, Mo., for appellee.

Before FAGG and BEAM, Circuit Judges, and
 WOODS,^{FN*} District Judge.

FN* The HONORABLE HENRY
 WOODS, United States District Judge for
 the Eastern District of Arkansas, sitting by
 designation.

HENRY WOODS, District Judge.

The appellants in these consolidated appeals were members of a cocaine distribution ring operating in the St. Louis area, with supply connections in California. Other than the appellants, indictments were secured against Michael Salsman, Dianna Bilyeu and Donald Mantro who pled guilty to drug offenses in connection with activities of the group. Appellant Giuffrida also pled guilty but now appeals, alleging errors in sentencing and in denying his motion to withdraw his guilty plea. The other five appellants entered not guilty pleas and were tried jointly before a jury in the United States District Court for the Eastern District of Missouri.^{FN1} On September 1, 1989, guilty verdicts were returned against appellants Michael Moit, Joseph Haag, Steven Carl McGirt, Mickie Meriwether and Clayton Hoelscher, and sentences were imposed ranging from 78 months to 120 months. Giuffrida received 220 months on his guilty plea. All filed separate appeals and are represented by separate counsel. Since they raise different grounds for reversal, along with some common grounds, the points raised by each will be discussed, *infra*, along with the specific statutory offenses charged against each appellant. We note, however, at the outset that

no prejudicial error is found in the conduct of this lengthy trial and affirm the judgment of conviction as to all six appellants.

FN1. The Honorable Stephen N.
 Limbaugh, United States District Judge for
 the Eastern District of Missouri.

The success of the prosecution in this case is due in large measure to the activities of Frank Bennett, a confidential informant who began cooperating with the Federal Bureau of Investigation and Internal Revenue Service in the fall of 1988. On November 17, 1988, Bennett, an employee of Michael Salsman, saw Giuffrida give Salsman a kilo of cocaine, after which Bennett drove Salsman to Moit's house to break up and weigh it since Moit had a scale. Salsman told Bennett later that Moit had received six ounces of the cocaine. The next day Salsman delivered cocaine to a number of other individuals including appellant Clayton Hoelscher at his bar in Troy, Missouri. Three days later on November 21, 1988 Bennett observed Hoelscher giving Salsman \$5,000 in cash, which coincided with a bank withdrawal of an identical amount by Hoelscher on the same date.

On December 10, 1988, Bennett saw Salsman pay Giuffrida \$10,000 for a kilo of cocaine. Again Bennett and Salsman went to Moit's house to break up the cocaine, which was distributed to other dealers. Salsman told Bennett that Moit received eight ounces of the cocaine. Bennett did not observe any delivery to Hoelscher after the transaction. Salsman received \$4,500 from Hoelscher during this time frame.

Salsman received a third kilogram from Giuffrida on January 13, 1989. The same visit to Moit's house was made by Bennett and Salsman. Bennett observed the breaking of the cocaine into smaller packages and its weighing. Moit kept six ounces and *1532 the remainder was distributed to others including Hoelscher.

On January 19, 1989 Bennett recorded a conversa-

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 9

tion between Moit and Salsman in which Salsman remarked that Clay Hoelscher wanted 20 more ounces of cocaine. Moit complained that one of his customers, who owed him \$2,800, lost these funds in a burglary and could only pay \$500. He also complained about a competitor undercutting him on price in Wright City, Missouri. Moit also mentioned trading an ounce of cocaine for \$2,000 in repairs on his truck. On the next day Bennett recorded a conversation with Haag and Salsman in which Haag expressed admiration for the boldness of black cocaine dealers and the quality of their product.

While Salsman was contemplating a trip to California for a supply of cocaine, Bennett recorded a conversation on January 30, 1989 between Salsman and Hoelscher in which the latter suggested a source in Columbia that might obviate a California buy. The Columbia buy did not materialize and plans were made by Salsman to obtain three to five kilograms of cocaine in California.

Giuffrida contributed \$45,000 to this buy. Others contributed \$21,000, including Mantro, one of the co-conspirators who entered a guilty plea. On February 7, 1989, Salsman sent Bennett to California in a rented Winnebago with \$65,000 concealed inside the panelling. In Los Angeles Bennett was to meet Salsman, Haag, who was to receive some of the cocaine, and "Cedric," a black male who was to assist in making the California buy. While en route to California on February 9, 1989, Bennett talked by telephone to Salsman and Haag, who had flown to Los Angeles and were at the Viscount Hotel. He learned that "Cedric" had failed to arrange the drug buy and had been beaten up for his efforts. "Cedric" was sent back to St. Louis.

Haag persuaded Salsman to remain in Los Angeles and develop another source. He suggested that appellant McGirt, back in St. Louis, had a cocaine source in Los Angeles. On February 10, 1989 Bennett, Haag and Salsman checked into Room 2169 of the Airport Marriott Hotel, from which Haag contacted McGirt and convinced him to come to Los

Angeles.

A Los Angeles deputy sheriff saw Salsman, Haag, McGirt and appellant Meriwether meet at the airport on February 10, 1990. McGirt checked into Room 2167 at the Airport Marriott. On February 11, 1989 Bennett met with McGirt, Haag and Salsman. Haag snorted some cocaine given to him by McGirt, which the latter had obtained from Meriwether. Salsman instructed Bennett to retrieve the money from the Winnebago, and \$60,000 was counted by Bennett, Haag, Salsman and McGirt and given to McGirt. A surveillance by the Los Angeles sheriff's department traced McGirt to a meeting with Meriwether prior to their driving away in a maroon/black Cadillac, a vehicle again observed at the time a search warrant was executed on Meriwether.

Salsman, Haag, McGirt and McGirt's girl friend returned to St. Louis. Meriwether delivered the cocaine to Bennett along with \$6,500, of which \$760 was returned to Meriwether. Bennett drove back to St. Louis with the money and the cocaine. He contacted Haag and set up a meeting at the Henry VIII Inn, St. Louis for February 15, 1989. The meeting was monitored by audio and video tapes. At this meeting Salsman and Haag tasted the cocaine. Haag mentioned that Giuffrida had an additional \$45,000. He was concerned about a possible theft if they continued "fronting the money." He also mentioned telling his people about the cocaine and referred to his brother as having a triple beam scale. When Haag and Salsman left, the latter had physical possession of a kilo of the cocaine and the money returned to Bennett by Meriwether. They were immediately arrested. Subsequently Giuffrida came to the Henry VIII Inn with Dianna Bilyeu, whom he had designated to pick up his share of the cocaine. They were arrested upon their departure. After the execution of a search warrant on his residence in Los Angeles, appellant Meriwether was arrested on February 15, 1989.

*1533 In Count I of the indictment the appellants, along with Michael Salsman, Donald Mantro and

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 10

Dianna Bilyeu, were indicted for violation of Title 21 U.S.C. § 846 (conspiracy to distribute cocaine). In Count II Salsman was indicted for an additional violation of distribution of cocaine. Along with McGirt, Salsman and Haag were charged with violation of Title 18 U.S.C. § 1952(a)(3) in Count III (interstate transportation in Aid of Racketeering). Haag and Salsman were charged in Count IV with violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(ii)(II) (possession with intent to distribute 2.2 pounds of cocaine on February 15, 1989) and in Count V for violation of the same section by distributing 4.4 pounds of cocaine on the same date. Alfred Giuffrida and Dianna Bilyeu were charged in Count VI with violation of the same section by possession of 4.4 pounds of cocaine with intent to deliver. Salsman was charged in Count VII with violation of 21 U.S.C. § 848 (continuing criminal enterprise) and in Count VIII for filing a false tax return in violation of Title 26 U.S.C. § 7206(1).

Prior to trial Salsman pled guilty to the continuing criminal enterprise and tax violation (Counts VII and VIII) and received a sentence of 280 months. Alfred Giuffrida pled guilty to Count VI as did Dianna Bilyeu. The former received a sentence of 220 months and the latter 63 months. Prior to trial Donald Mantro pled guilty to a superseding felony information and received a sentence of 41 months.

A recitation of the above facts which are supported by substantial evidence demonstrates that each of the appellants was deeply involved in a conspiracy to distribute large quantities of cocaine. Giuffrida, Salsman and Haag provided directions for the conspiracy and furnished the operating funds. Hoelscher and Moit were middlemen and wholesalers in the chain of distribution, while McGirt and Meriwether were involved with procuring a supply of the product in California. Evidence implicating all of the appellants is both direct and circumstantial. We now address the specific contentions of the appellants.

I. JOSEPH HAAG

A. Sufficiency of the Evidence

[1] The statement of facts set forth above demonstrates that Haag was a major player in this conspiracy. While perhaps not as important to the operation as Salsman, who appears to have been the principal mover and shaker, Haag was Salsman's constant companion and advisor and was present at key events in the operation of the conspiracy.

The evidence is clear that without Haag's input, the trip to California would have been futile. After the first connection to a source in Los Angeles proved fruitless, Salsman wanted to give up. It was Haag who persuaded him to try another connection, and it was Haag who established this connection, persuading McGirt to come to Los Angeles and develop the source through Meriwether. (Tr. II:107-110).

Haag's importance in this phase of the operation is shown by the fact that when Bennett arrived from Los Angeles he called Haag, who notified the others to come to the Henry VIII Inn on February 15, 1989. Haag was the first to arrive at the Inn. (Tr. II:120-27). He sampled the cocaine by tasting it and was to receive six ounces. Haag, who accompanied Salsman to California, was principally responsible for securing a supply of cocaine in California for distribution back in St. Louis. He was also a key link in obtaining the cocaine from Bennett and assuring its delivery to Alfred Giuffrida and Dianna Bilyeu. (Tr. II:134-35). There was thus substantial evidence to support the jury's conviction on the four counts of the indictment in which he was named. Haag argues that there is no direct evidence that he had agreed to become a member of the conspiracy. He claims that he was simply an innocent associate of Salsman. The facts belie such an argument, and it cannot be sustained in the case law. "The agreement may be established by circumstantial evidence, as conspiracies seldom lend themselves to proof by direct evidence." *United States v. Kaminiski*, 692 F.2d 505, 513 (8th Cir.1982). While we do not regard the evidence of Haag's involvement*1534 in this conspiracy as slight, "[o]nce the existence of a conspiracy is established,

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 11

evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him of knowing participation in the conspiracy." *United States v. De Luna*, 763 F.2d 897, 924 (8th Cir.1985), *cert. denied*, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985), quoting with approval from *United States v. Dunn*, 564 F.2d 348, 357 (9th Cir.1977).

[2][3] Proof of a formal agreement is not necessary to prove the existence of an agreement. Proof of a common plan or tacit understanding is sufficient. *United States v. Powell*, 853 F.2d 601, 604 (8th Cir.1988); *United States v. Campbell*, 848 F.2d 846, 851 (8th Cir.1988); *United States v. Massa*, 740 F.2d 629, 636 (8th Cir.1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985); *Nilva v. United States*, 212 F.2d 115, 121 (8th Cir.1954), *cert. denied* 348 U.S. 825, 75 S.Ct. 40, 99 L.Ed. 650 (1954). Once a person joins a conspiracy, as Haag undoubtedly did by flying to California with Salsman and playing a major role in obtaining a large amount of cocaine for distribution in the St. Louis area, he assumes full liability for the conspiracy even though he joined in the later stages. *Blumenthal v. United States*, 332 U.S. 539, 556-58, 68 S.Ct. 248, 256-57, 92 L.Ed. 154 (1947). The evidence detailed in the introduction, *supra*, is not only sufficient to sustain Haag's conviction of conspiracy (Count I) but also of possession (Count IV) and distribution (Count V) of cocaine. It also sustains his conviction under the Travel Act, Title 18 U.S.C. § 1952(a)(3).

The evidence is overwhelming that Haag engaged in interstate travel to promote, establish, manage and carry on a scheme to obtain and distribute large quantities of cocaine. He not only traveled from St. Louis to Los Angeles to facilitate this project but persuaded McGirt to make a similar interstate trip. There was substantial evidence that Haag engaged in a continuous course of conduct to promote drug trafficking and that his interstate travel was a part of this enterprise. His activities were similar to

those of other conspirators, whose convictions have been affirmed by this court for violations of the Travel Act. *See United States v. Spector*, 793 F.2d 932, 936 (8th Cir.1986), *cert. denied*, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987); *United States v. Krevsky*, 741 F.2d 1090, 1094 (8th Cir.1984).

B. Refusal of Haag's Proffered Instruction No. 4

[4] Haag offered instruction No. 4 reading as follows:

Mere presence at the scene of a sale, purchase, or transfer of illegal drugs, or mere similarity of conduct among various persons and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not establish proof of membership in, or the existence of, a conspiracy.

The court refused this instruction but covered essentially the same concept in the second paragraph of Instruction No. 19, defining the crime of conspiracy. This paragraph reads as follows:

Mere similarity of conduct among various parties and the fact that they may have associated with each other, and may have assembled together, and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

(App. 207).

[5] Therefore, the court did not err in refusing Instruction No. 4. Additionally, the record does not disclose that Haag advanced any reason why Instruction No. 4 should have been given nor did he make timely and specific objections for the failure of the court to give the instruction. (Tr. VI:21-23). Merely offering a requested instruction to the trial judge for consideration is not sufficient to preserve the error and satisfy Fed.R.Crim.P. 30. *United States v. Hecht*, 705 F.2d 976, 978 (8th Cir.1983).

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 12

The instruction offered by Haag is objectionable for another reason. The evidence *1535 shows beyond all peradventure that Haag was not "merely present" at the sale, purchase and transfer of illegal drugs but was an active participant in these activities.

C. Alleged Evidentiary Errors

[6] Haag claims that the court erred in permitting Bennett to testify as to an oral statement by Haag concerning receipt of six ounces of the cocaine bought in California. (Tr. II:104). The statement was clearly admissible since it was a statement by a co-conspirator during the conspiracy. Haag, however, contends that the statement was discoverable under Fed.R.Crim.P. 16, which he had invoked. This rule does not cover testimony by a government witness as to an oral statement by a conspirator in the course of the conspiracy. It covers oral statements made by defendant "in response to interrogation by any person then known to the defendant to be a government agent." *United States v. Vitale*, 728 F.2d 1090, 1093-94 (8th Cir.1984). Rule 16 provides that statements of Government witnesses are not discoverable except as provided by Title 18 U.S.C. § 3500, the Jencks Act.

[7] The statement was discoverable under Title 18 U.S.C. § 3500, provided it was (1) a written statement made by the government witness and signed or otherwise adopted or approved by him, or (2) a stenographic, mechanical, electrical or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement.

The Government did not know about Haag's statement to Bennett until the day before Bennett testified. It was never recorded into a memorandum or interview and adopted as true and correct by Bennett. Bennett testified about the statement on direct examination without objection (Tr. II:106) and was cross-examined vigorously by Haag's counsel about

the statement. (Tr. II:167-72, III:4-11). FBI Agent Abrams learned about the Haag statement the day before Bennett testified. (Tr. III:206). There is much resemblance to *United States v. Taylor*, 599 F.2d 832, 836 (8th Cir.1979). The Government's chief witness, just as in the instant case, testified to a damaging statement by defendant. "Shortly before trial, Worley informed the government's counsel of the threat but no transcription was made of this statement." *Id.* at 839. This is precisely what happened in the case at bar. "The appellant did not object at trial to this examination on the basis of a Jencks Act violation or for reason of irrelevance or prejudice. Accordingly, the appellant is precluded from raising these issues here." *Id.* at 839. We hold that it was not error to admit this statement.

[8] Haag also claims that the court erred in refusing to permit the introduction of FBI reports furnished to him as Jencks Act material. Those reports appear as Exhibits 9, 10, 12, 13, 15, 17 and 23 and are set out in the Joint Appendix of Hoelscher, Haag and McGirt, pp. 429-438. This material was furnished to appellant and was used extensively on cross-examination to elicit testimony deemed favorable to Haag. We have carefully examined this material. It consists of FBI interviews with Bennett and other Government witnesses, as well as surveillance reports of the FBI and other law enforcement officers. Other defendants objected to the introduction of these reports because they contain material incriminating them. Significantly Haag did not move for the introduction of all the FBI interviews and surveillance reports but only selected ones with infrequent mention of his name. It is apparent that Haag utilized these reports to the fullest extent in his defense. The court did not err in refusing to permit the actual FBI reports to be introduced. Haag was in no wise prejudiced by this ruling.

[9] Haag also claims that the Government improperly introduced evidence of an arson allegedly committed by Haag at Salsman's behest. This evidence was contained in the videotape of a meeting between Haag, Bennett and Salsman on February

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 13

15, 1989. At Haag's request this portion of the tape was deleted and not shown to the jury. It was not brought out by the *1536 Government on its direct examination of Bennett but was injected by co-defendant Hoelscher on cross-examination. (Tr. III:129). We note that the trial judge firmly admonished the jury that the defendants were on trial only for conduct alleged in the indictments. (Tr. III:133-34). In refusing to grant Haag's motion for a mistrial, the trial judge did not abuse his discretion which is the standard of review. *United States v. O'Connell*, 841 F.2d 1408, 1427 (8th Cir.1988).

Haag charged serious prosecutorial misconduct in violating a purported agreement to exclude the testimony. Whether there was such a violation is arguable. But even if there was prosecutorial misconduct, it does not follow that the trial judge abused his discretion in denying a mistrial. The recent decision of this court in *United States v. Figueroa*, 900 F.2d 1211, 1216 (8th Cir.1990) thoroughly considered this issue and reiterated the standards to be followed in reviewing the trial court's actions:

In assessing the prejudicial impact of the prosecutorial misconduct, we consider the following: "1) the cumulative effect of the misconduct; 2) the strength of the properly admitted evidence; and 3) the curative actions taken by the trial court." *United States v. Andrade*, 788 F.2d 521, 530-31 (8th Cir.1986), *cert. denied sub nom.* 479 U.S. 963, 107 S.Ct. 462, 93 L.Ed.2d 408 (1986).

.... We must view the prosecutorial misconduct in the context of the entire trial, *United States v. Dawkins*, 562 F.2d 567, 568 (8th Cir.1977), and when we do so, particularly in light of the substantial and persuasive evidence of guilt, we conclude that the misconduct was no more than harmless error. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-42, 60 S.Ct. 811, 851-53, 84 L.Ed. 1129 (1940).

Moreover, we are satisfied that the court's curative actions here dispelled any potential for undue prejudice stemming from the improper remarks.

These comments apply with particularity to the case now before us.

D. Non-Disclosure of Payment to Government Informant

[10] Haag claims error in the failure of the Government to disclose payment by the IRS of \$1500 to Bennett plus extending to him a moratorium on a civil tax debt of \$42,000. Haag admits that the Government provided information as to monies paid to Government witness Bennett for his living expenses. Bennett had personally worked out a schedule of payments to liquidate his liability to the IRS. The FBI had arranged for a moratorium while he was acting as an informant. The IRS had paid Bennett \$1,500. The exact reason for this payment is unclear. The only phase of the case in which the IRS had an interest was the indictment and conviction of Salsman for tax evasion. Presumably Bennett was paid in connection with this investigation. This was a minor facet of this criminal enterprise and affected only Salsman who pled guilty.

Conceding that the information should have been furnished to Haag, under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) we find his argument for reversal to be without merit for the simple reason that no prejudice has been demonstrated. On cross-examination Haag's counsel developed information about both the \$1,500 payment and the tax moratorium. (Tr. III:35-38, 196). We are convinced that this result would not have been changed or that Haag's trial tactics would have been different had this information been furnished to defense counsel before trial. As this court said in *United States v. Risken*, 788 F.2d 1361, 1375 (8th Cir.1986):

The government should have disclosed the implied understanding that existed between Greenfield and the FBI about the possibility of a post-trial payment. The defense could have used this information to further impeach Greenfield's credibility. Nonetheless, Greenfield's status as a paid

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 14

government witness and his employment by the FBI as a paid informant had already been brought out before the jury, although the payments which had been disclosed to the defense *1537 and to the jury were substantially less than the post-trial payment. More importantly, however, the government's case did not depend upon Greenfield's testimony alone.

See *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), holding that a conviction must be reversed "only if the evidence is material in the sense that its suppression would undermine confidence in the outcome of the trial." *Id.* at 678, 105 S.Ct. at 3381. In a case decided August 31, 1990, this court made the following significant comment: "The *Bagley* test, however, requires that we determine whether the withheld information probably would have caused the jury to reach a different result." *Orsini v. Wallace*, 913 F.2d 474, 481 (8th Cir.).

E. Alleged Guidelines Violation

[11] Haag's contention with respect to the Guidelines are completely without merit. He claims to have been a "minimal participant" who should have been given a four level downward departure. We agree with the trial judge. The evidence outlined, *supra*, established that Haag was a major participant in this cocaine ring and did not deserve a downward departure.

[12] Whether he accepted responsibility for his actions is a matter best weighed by the trial judge who heard all the evidence and post-trial proceedings. Clearly, the experienced trial judge did not abuse his discretion in refusing to give Haag a reduction for acceptance of responsibility. His decision finds support in the record.

[13] Last, Haag claims that the misdemeanor convictions for assault and petty theft should have been disregarded. Appellant is incorrect. Misdemeanors count unless similar or the same as those enunciated

ated in Section 4A1.2(c)(1) and (2) which are excludable. Assault and theft are not listed and neither are similar offenses.

[14] However, his claim should not be considered as it is not appealable. These misdemeanor convictions raised his criminal history from a Category II to III, with a guideline range of 97 to 121 months. Category II has a guideline range of 87 to 108 months. The sentence of 100 months was within both guideline ranges and was permissible even if Haag's contention with respect to the misdemeanors were valid. It was therefore not appealable. *Cf. United States v. Bermingham*, 855 F.2d 925, 931 (2d Cir.1988) (not appealable if sentence is unaffected by selection of applicable guideline range).

II. MICHAEL MOIT

A. Sufficiency of the Evidence

[15] There is strong evidence linking Michael Moit with this drug conspiracy. Frank Bennett, who was acting as an undercover informant for the FBI, testified that after a meeting with Giuffrida and Salsman on November 17, 1988, when cocaine was delivered to Salsman by Giuffrida, Bennett and Salsman went to Mike Moit's house. Bennett waited outside in the truck, but he observed Salsman meet Moit in the garage and then enter Moit's house with the package of cocaine he had received from Giuffrida. Thirty to forty-five minutes later Salsman returned to the truck "with a baggie, a large baggie, with a lot of little baggies inside of it, stuffed in the coat of his jacket." [sic] He told Bennett it was cocaine. (Moit App. 20-26).

Salsman told Bennett that the purpose of going to Moit's house was to break up the cocaine and that Moit had a scale. According to Salsman, Moit always got his cut when they broke up the cocaine and on this occasion he received six ounces. (Moit App. 32).

This same procedure was repeated on December 10, 1988. A kilo of cocaine was delivered by Giuffrida

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 15

to Salsman. Salsman, Bennett and a man named Ron Martin went to Moit's house. Bennett and Martin stayed in the car. Again Salsman returned with "a large baggie with a bunch of little white packages in it." Salsman told Bennett later that Moit had received eight ounces of the cocaine. (Moit App. 34-39).

On another occasion Salsman received a package of cocaine from a man named *1538 Blaze. Giuffrida was present. Salsman and Bennett again went to Moit's house to break up the cocaine. On this occasion Bennett went into Moit's house, where the kilo of cocaine was broken up and weighed. Moit measured out the cocaine and explained the operation of the scale. Moit kept a packet of the cocaine or six ounces. (Moit App. 42-45).

The tape of the January 19, 1989 conversation between Bennett, Salsman and Moit further demonstrates Moit's deep involvement in this conspiracy. Moit expressed great displeasure at a competitor in Wright City, Missouri who was undercutting him in price. He also complained about a customer who was a theft victim and therefore unable to pay him. (Tr.Vol. 11:74; Gov.Ex. 9A), (composite tape) Ex. 9 (composite transcript). Moit also talked about trading cocaine for work on his truck, which was corroborated by another witness and a document (Tr.Vol. II:7-13; Gov.Ex. 29).

A simple recital of the above testimony demonstrates the lack of merit in Moit's contention that he was entitled to a judgment of acquittal for insufficiency of the evidence to support a conviction on the conspiracy charge (Count I).

B. The Testimony of Bennett that Haag had Committed Arson

This testimony of Bennett was thoroughly discussed, *supra*, since Haag relied on it as one of his principal points for reversal. While there may be some slight merit in Haag's argument, there is none in Moit's contention. Moit's name is never men-

tioned in this testimony (Moit App. 54-59). He did not object to the testimony or join Haag in asking for a mistrial. For these reasons and those stated, *supra*, in connection with Haag's appeal, we summarily reject Moit's argument on this point.

C. Failure to Instruct on Single v. Multiple Conspiracy.

[16] Moit claims that the court erred in failing to instruct the jury on multiple conspiracies as the evidence was insufficient to show an overall conspiratorial agreement between Moit and the other conspirators to possess and distribute cocaine. We disagree with Moit's interpretation. We find abundant evidence in the record to support a single overall conspiracy. The involvement of a number of separate transactions does not establish the existence of separate conspiracies. *United States v. Spector*, 793 F.2d at 935-36. "The existence of a single agreement can be inferred if the evidence revealed that the alleged participants shared 'a common aim or purpose' and 'mutual dependence and assistance existed.'" *United States v. De Luna*, 763 F.2d at 918, quoting *United States v. Jackson*, 696 F.2d 578, 582-83 (8th Cir.1982), cert. denied, 460 U.S. 1073, 103 S.Ct. 1531, 75 L.Ed.2d 952 (1983). With respect to single versus multiple conspiracies, this court has set forth the following guidelines:

The general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. A conspirator need not know all of the other conspirators or be aware of all the details of the conspiracy, so long as the evidence is sufficient to show knowing contribution to the furtherance of the conspiracy.

United States v. Massa, 740 F.2d 629, 636 (8th Cir.1984), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). In our opinion the evidence here strongly supports a single overall conspiracy and not multiple conspiracies under the standard delineated above.

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 16

Furthermore, we find no indication in the addendum of Appellant Moit or the transcript that such an instruction was requested by Moit. If such an instruction was offered, nothing in the record is called to our attention where counsel gave the court explicit reason why the proffered instruction should have been given, as required by *United States v. Hecht*, 705 F.2d 976, 978 (8th Cir.1983). In fact Moit's counsel in response to the court's statement that he would "now entertain objections from the parties as to the failure of the court to give tendered instructions," replied, "I have no objections." (Tr. VI:16-17). Even if such an instruction had been offered, we hold *1539 that the court would not have erred in refusing it.

III. STEVEN CARL MCGIRT

A. Sufficiency of the Evidence to Sustain Travel Act Conviction

[17] McGirt does not attack the sufficiency of the evidence to sustain his conviction on the conspiracy count (Count I). He argues that the evidence is insufficient on Count III, charging a violation of Title 18 U.S.C. § 1952, the Travel Act. This argument lacks merit. Salsman and Haag went to Los Angeles to buy cocaine, accompanied by a man identified as "Cedric" who was supposed to establish the California source for the drug. When "Cedric" was unsuccessful in making a connection, Haag called McGirt and persuaded him to fly to Los Angeles because Haag knew that McGirt had connections with a cocaine source in Los Angeles. (Tr. II:109-113). Salsman needed a large amount of the drug to continue the large-scale operation in the St. Louis area. Salsman was about ready to abandon the enterprise. McGirt's intervention with appellant Meriwether resulted in Salsman and Haag obtaining the requisite supply of cocaine. (Tr. 107-125). Only then was success of the project assured and only then could the drug enterprise continue to operate on its accustomed large scale.

McGirt's travel clearly came within the ambit of

Title 18 U.S.C. § 1952(a). Without a doubt he traveled in interstate commerce to "promote ... or facilitate the promotion ... of an unlawful activity," which is defined in the act as "any business enterprise ... involving ... narcotics or controlled substances." McGirt not only "promoted" the operation of the drug ring, but also saved it from suspending operations because of the lack of a supply.

B. The Admissibility of Statements about McGirt in the Audio and Video Tapes of February 15, 1989

[18] When Bennett returned from California with the cocaine, he obtained a room at the Henry VIII Inn and set up audio and video coverage. He then arranged to meet Haag, Salsman and Giuffrida. Haag came first and then the others. McGirt's part in the activities in Los Angeles was mentioned along with future plans of the group. McGirt contends that these tapes were inadmissible. Some of the statements were very incriminating, such as Haag's statement, "Steve McGirt wants to work again." (Gov.Ex. 9, p. 8). There is also a discussion of McGirt's activities in Los Angeles and speculation as to whether he skimmed money in the deal.

Declarations on the tape were clearly "in furtherance of the conspiracy," as required by 801(d)(2)(E). The requirement for admissibility has been construed broadly. *United States v. Lewis*, 759 F.2d 1316, 1340 (8th Cir.1985). "We have previously found that statements of explanation which reveal the progress of the conspiracy are made in furtherance of it." *Id.* at 1340, citing *United States v. Massa*, 740 F.2d 629, 638 (8th Cir.1984), *United States v. Handy*, 668 F.2d 407, 408 (8th Cir.1982) and *United States v. Bentley*, 706 F.2d 1498, 1506 (8th Cir.1983), *cert. denied*, 467 U.S. 1209, 104 S.Ct. 2397, 81 L.Ed.2d 354 (1984).

[19] Statements of co-conspirators are admissible if the government demonstrates (1) that a conspiracy existed, (2) that the defendant and declarant were members of the conspiracy, and (3) that the declarations were made during the course of and in further-

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 17

ance of the conspiracy. *United States v. Bell*, 573 F.2d 1040, 1043 (8th Cir.1978). We find that all three conditions were met by the Government and the tape was properly received in evidence.

Fed.R.Evid. 104(a) requires the district court to apply a preponderance of the evidence test in assessing the admissibility of evidence. *Bourjaily v. United States*, 483 U.S. 171, 176, 107 S.Ct. 2775, 2779, 97 L.Ed.2d 144 (1987). Here the evidence decidedly preponderated in favor of the admissibility of the tapes detailing the meeting of the conspirators to distribute the cocaine obtained in California. In making its determination as to the admissibility of the co-conspirators' statements, the court *1540 may consider any relevant evidence, including the statements sought to be admitted. *Bourjaily v. United States*, *supra* at 176-79, 107 S.Ct. at 2779-81; *United States v. Meeks*, 857 F.2d 1201, 1203 (8th Cir.1988). The trial court did not commit error in permitting the introduction of the tapes.

IV. MICKIE MERIWETHER

A. Admissibility of the Tapes on the February 15, 1989 Meeting

Appellant Meriwether advances the same argument as McGirt concerning the tapes of conversations of the co-conspirators in Bennett's room at the Henry VIII Inn on February 15, 1989. There was an allusion to Meriwether as the source of the cocaine obtained in Los Angeles. Meriwether attacks admission of the tapes on the same basis as does McGirt. He contends that the statements were not made "in furtherance of the conspiracy." We disagree for the reason stated, *supra*, in denying the identical contention by appellant McGirt.

B. Evidence of Marijuana Seized in Meriwether's Apartment

[20] On February 15, 1989, Meriwether was arrested and a search warrant was executed on his home at 5511 Cherry Street, Long Beach, California (Tr.

I:94). The following items were seized: (1) a triple beam scale, (2) a Friden electric scale, (3) a piece of Marriott Hotel note paper with Frank Bennett's name and Room 2169 written on it, (4) another paper with "Steve" and the number 2167 on it (this was the number of the room occupied by Steve McGirt at the Marriott Hotel), (5) an address book containing "Steve" and a telephone number, (6) several ziplock plastic bags, (7) a sifter, (8) a bag of dextrose (a diluent for cocaine), (9) \$1300 in currency, and (10) a small quantity of marijuana.

Meriwether does not object to the other items but contends that admission into evidence of the marijuana seizure was prejudicial error. All these exhibits, particularly if they are associated with the marijuana, can be construed as narcotic paraphernalia and indicia of drug dealings. It is true that Meriwether was charged with a conspiracy to distribute cocaine and that there is substantial evidence that he delivered three kilograms of cocaine to Bennett. The fact that marijuana alone was found in his house does not make the presence of that particular drug irrelevant and inadmissible, particularly when found with the other items. *Llach v. United States*, 739 F.2d 1322, 1327 (8th Cir.1984) (previous importation and distribution of methaqualone and marijuana held proper in cocaine prosecution); *United States v. Vitale*, 728 F.2d 1090, 1092 (8th Cir.1984) (prior marijuana sale and Uzzi sub-machine gun held admissible in cocaine prosecution); *United States v. Kadouh*, 768 F.2d 20, 21-22 (1st Cir.1985) (cocaine use held admissible in heroin prosecution).

C. The Alleged Batson Violation

After the challenges for cause, six black jurors were left on the panel. The Government struck three by the exercise of its peremptory challenges. Meriwether raised a *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) challenge on the ground that fifty percent of the blacks had been peremptorily removed. The trial judge held that a *prima facie* case had been made by Meriwether, a

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 18

black man. The Government was invited to state its reasons for the strike.

[21] As to Ms. Darlene Dougherty, the Government stated that she said nothing during voir dire, it did not like her background and youthful age, and generally preferred men to women on narcotics cases. (Tr. Voir Dire:122-23). This does not show a *Batson*, *supra*, violation. *United States v. Nicholson*, 885 F.2d 481, 482-83 (8th Cir.1989), *United States v. Wilson*, 867 F.2d 486 (8th Cir.1989). *United States v. Young-Bey*, 893 F.2d 178, 179-80 (8th Cir.1990), *United States v. Hughes*, 880 F.2d 101, 103 (8th Cir.1989), remanded for additional hearing and *aff'd*, 911 F.2d 113 (8th Cir.1990).

[22] The other two strikes by the Government were also females. (Tr. Voir Dire:123). Both had family members with drug problems. The Government stated *1541 that Mrs. Thompson appeared bored and disinterested. Her demeanor and dress did not impress the Government attorney. Mrs. Thompson also had some drug problems in her family life. (Tr. Voir Dire:123-24). The Government struck Miss Scott mainly due to her niece's association with cocaine (Tr. Voir Dire:123-24). Since Ms. Thompson did not know the nature of the jury case (criminal or civil) on which she had previously served, the Government felt she would not be able to clearly follow this evidence (Tr. Voir Dire:124). She was also slow and reluctant to admit the drug situation in her family (Tr. Voir Dire:129). The trial court determined that the Government's peremptory strikes were race-neutral and *Batson*, *supra*, was not violated. We hold that the court did not abuse its discretion. *Batson*, *supra* 476 U.S. at p. 98, 106 S.Ct. at p. 1724; *United States v. Fuller*, 887 F.2d 144, 146 (8th Cir.1989); *United States v. Ross*, 872 F.2d 249, 250 (8th Cir.1989); *United States v. Davis*, 871 F.2d 71, 73 (8th Cir.1989).

V. CLAYTON LEE HOELSCHER

A. Sufficiency of the Evidence

[23] Appellant Hoelscher attacks the sufficiency of the evidence to sustain his conviction of conspiracy under Count I of the indictment. He argues that his motion for a judgment of acquittal should have been sustained. In the alternative he asks for a new trial.

If the jury believed the Government's informant and chief witness, Frank Bennett, which it had a right to do, there was strong evidence that Hoelscher was a significant member of the drug conspiracy. There is independent corroboration of Bennett's testimony. Bennett testified that on November 7, 1989, as detailed, *supra*, Giuffrida gave Salsman a kilo of cocaine, which was broken up and delivered to several individuals, including Hoelscher. The next day Salsman and Bennett met with Hoelscher at Blondie's-Hoelscher's bar in Troy, Missouri, which at that time was under construction (Tr. II:46). Salsman put twenty ounces of cocaine underneath the seat in Hoelscher's car (Tr. II:47). At the time this was done, Hoelscher was inside the restaurant, but they went back inside and met with Hoelscher alone and Salsman told him that the cocaine had been placed underneath the front seat of the driver's side. Hoelscher responded, "Okay." (Tr. II:48).

On November 21, 1988, Bennett and Salsman again visited Hoelscher at which time the latter gave Salsman \$5,000 enclosed in money wrappers (Tr. II:50). Hoelscher admitted that this transaction had occurred but claimed it was a loan repayment (Tr. V:177). Salsman told Bennett that he had received \$4,500 from Hoelscher at the latter's house on December 15, 1988 (Tr. II:61). Hoelscher acknowledged this payment also but claimed it, too, was repayment for a loan (Tr. V:177). He admitted the money had been owed to Salsman for a year and a half (Tr. V:177).

The January 30, 1989 tape wherein Bennett recorded a conversation between Salsman and Hoelscher is damaging to Hoelscher. This tape demonstrates Hoelscher's close association with Salsman and others involved in the conspiracy. In it Hoelscher suggested to Salsman that he had information about a

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 19

source in Columbia by the name of "Rodney." (Supp.Jt.App. of Hoelscher, Haag and McGirt, p. 22). They discussed price and quantity, and Hoelscher suggested that if this source worked out, "You don't have to leave the state either." (*Id.* at 22). Later on Hoelscher said, "At least you wouldn't have to go nowhere ... he might even front you some ... he must be sitting on a shit load cause he wanted to talk to me right then." (*Id.* at 23). Later on Hoelscher said, "I ain't driving up there for ten ounces" *Id.* at 23). Later it is clear that when they talked about the out-of-state travel, they were referring to the proposed trip to California (*Id.* at 29).

Another tape of January 19, 1989, in which Bennett recorded a conversation between Salsman, Moit and himself, disclosed that Clay Hoelscher wanted twenty more ounces of cocaine from Salsman. Hoelscher told Salsman he had money in the bank *1542 to pay for it and he was told to go get it (Gov.Ex. 9-J).

From the above evidence, it is rather obvious that Hoelscher was a middleman in the operation of the drug ring. He obtained rather large quantities of cocaine from Salsman and made distribution to his user-customers. The depth of Hoelscher's involvement and his status as a big-time dealer is shown by his statement that he would not go to Columbia for ten ounces. It is evident that the Government made out a strong factual case against Hoelscher by both direct and circumstantial evidence. The legal principles involved in establishing a conspiracy are set forth in the discussion of Haag's attack on the sufficiency of the evidence, *supra*.

B. Refusal of Court to Give Hoelscher's Instruction No. 1

[24] Hoelscher offered as his Instruction No. 1 the following: "If a party offers weaker and less satisfactory evidence when stronger and more satisfactory evidence could have been produced, you may view the evidence offered with suspicion." He contends that this instruction should have been given

because the Government's principal witness against Hoelscher was Bennett, when Salsman could have been used.

The propriety of giving such an instruction is clearly within the discretion of the trial court. *United States v. Williams*, 481 F.2d 735, 738 (8th Cir.1973), *cert. denied*, 414 U.S. 1026, 94 S.Ct. 453, 38 L.Ed.2d 318 (1973). "Absent unusual circumstances such as knowingly concealing evidence favorable to a defendant, the government has wide discretion with respect to the witness to be called to prove its case." *Id.* at 738.

In this case the Government had every reason to rely on Bennett rather than Salsman. Bennett had no prior record and was not a drug user. No criminal charges were dismissed in return for his cooperation. (Tr. II:30). Examination of the transcript of his testimony indicates that Bennett made an excellent witness for the Government. He had a good memory for detail and effectively withstood vigorous cross-examination. Salsman on the other hand was a co-conspirator with perhaps the principal role in this conspiracy. As a witness he was vulnerable from many aspects. Salsman had pled guilty and could have been called by any of the appellants. They chose not to do so. It is hardly appropriate for one of the appellants to criticize the Government's tactics in failing to call him. The trial court did not err in refusing this instruction.

C. The Juror's Alleged Misconduct

[25] Hoelscher claims that he should receive a new trial because one of the jurors, Wayne Boyd, failed to disclose during voir dire that he knew Hoelscher. All of the defendants stood when the question of whether any member of the panel knew any of them was asked. Boyd did not indicate that he knew Hoelscher. It is of course possible that Boyd did not know him or that he had no recollection of Hoelscher. This matter is raised in the motion for new trial and consists only of Hoelscher's bare allegation that they had a past association and the al-

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 20

legation that Boyd recognized Hoelscher's mother. This testimony in the case was concluded on August 30. The jury began its deliberation late on August 31, but was permitted to adjourn after only about an hour's deliberation. In his motion for a new trial, Hoelscher stated that it was not until August 30, at the end of an eight-day trial that he "recognized juror number four (4), Wayne Boyd as an individual that he had known for a very long time from the Troy, Missouri area. In fact, Defendant Clayton Hoelscher recalled that as recently as a couple of years prior to the trial of this matter he had bowled in a league against juror number four (4), Wayne Boyd, on numerous occasions."

One wonders why, if Hoelscher and Boyd had such a frequent and recent association, Hoelscher did not recognize Boyd at the voir dire. At that time his attorney could have questioned Boyd about possible bias. At no time did Hoelscher call the purported acquaintanceship to the attention of the court. The strong suspicion arises that Hoelscher withheld the information from *1543 the court, gambling on the possibility that Boyd would be a favorable juror to him.

The unsupported allegation in appellant's motion for new trial comes far too late. We decline to order a new trial or to furnish an opportunity at this late date to voir dire Boyd, as requested by appellant. We hold that appellant waived his right to obtain such relief.

In *United States v. Dean*, 667 F.2d 729 (8th Cir.1982) (en banc) a juror during the trial made an out-of-court statement that the defendant was guilty and would be convicted. This information was transmitted to defendant's attorney by an anonymous note while the trial was in progress. However, counsel did not apprise the trial judge of this development. After an adverse verdict, defense counsel made a post-trial motion for a new trial based on the juror's statement. At the hearing on the motion it developed that the juror had actually made the statement. The trial judge declined to order a new trial and was affirmed by this court. The district

judge found that defense counsel knew about the juror's misconduct from the note, but neither he nor his client, who knew the informant's identity, brought it to the attention of the court or sought any relief, and there were two alternate jurors on duty at all times. In this case there were also two alternates. (Tr. Voir Dire:114). This court adhered to the general rule that jury misconduct known to defendant or his counsel and not called to the attention of the court before the return of the verdict, cannot be a ground for a new trial. *United States v. Dean*, *supra* at 733. The court then cited two cases from this circuit following this general rule. It quoted the following excerpt from *United States v. Nance*, 502 F.2d 615, 621 (8th Cir.1974): " 'A party may not stand idly by, watching the proceedings and allowing the Court to commit error of which he subsequently complains.' " 502 F.2d at 621, quoting *McNeely v. United States*, 353 F.2d 913, 917 (8th Cir.1965). In closing Judge Henley wrote for a majority of the full court:

In sum, we decline to make a distinction between possible prejudice and actual prejudice when addressing the issue of waiver. We conclude that our line of decisions, culminating in *United States v. Sorenson*, 611 F.2d 701, 702 (8th Cir.1979), is controlling, and that appellant, by not bringing the question of juror misconduct to the attention of the trial court before the verdict was returned, thereby waived his right to a new trial.

United States v. Dean, *supra* at 734.

D. Allegation of Error

[26] Hoelscher claims that he should have had a downward departure under the Sentencing Guidelines because he had a minimal role in the conspiracy. We agree with the trial judge that Hoelscher's role in this conspiracy was not minimal. He was a major distributor for this drug ring. He busied himself with trying to find additional supply sources for Salsman. The sentencing court's find-

914 F.2d 1527
 914 F.2d 1527
 (Cite as: 914 F.2d 1527)

Page 21

ings must be accepted unless they are clearly erroneous. *United States v. Goebel*, 898 F.2d 675 (8th Cir.1990). The sentence imposed in this case was proper under the guidelines.

Hoelscher joins Haag in claiming error for failure to disclose the Internal Revenue Service moratorium and the \$1500 payment to Bennett. This contention was fully discussed, *supra* in Section I(D) of this opinion.

VI. ALFRED GIUFFRIDA

A. *Withdrawal of Guilty Plea*

[27] Appellant pled guilty to Count VI of the indictment. Count I was then dismissed. The sentencing transcript showed that the trial judge fully explained appellant's rights to him and the implications of his guilty plea under both the statute and the guidelines. Count VI charged that on February 15, 1989 appellant had distributed 4.4 pounds of cocaine. Appellant claims that when he entered this plea, it was his understanding that he could only be held responsible for the amount of cocaine alleged in Count VI. In other words, the guideline range would be restricted to a computation based on 4.4 pounds or 2 kilograms of cocaine.

Judge Limbaugh's explanation refutes such a contention:

*1544 Now when the information on you is inserted and the formula comes out with an answer, the range may be different. Instead of ten years, it could be fifteen years to life, or it could be ten years to thirty years, or ten years to twenty-five years, or ten years to fifty years.

....

So if the maximum happens to be 25 years, and I elect to give you the maximum, then I couldn't give you more than twenty-five years, even though the statute provides for life.

....

Mr. Gilmore may have tried to estimate it for you; Mr. Reap could even try it, and I could even try it, but we may not be right. If Mr. Gilmore has given you an estimate, and he is doing this for your benefit, so you can attempt to know where you are in this, but he may be wrong. So I want you to know, if he has given you any kind of estimate at all, it's only an estimate. And if anyone has told you that these are the specific Guidelines, that I will be following with respect to the range of punishment, then it's only an estimate only; do you understand that, sir?

The Defendant: "Yes, your honor."

(Tr. 18-19).

At the trial substantial evidence was adduced that Giuffrida was involved in the distribution of much more than two kilograms of cocaine. Distribution was established, placing him in the guideline range for 5 to 14.9 kilograms of cocaine. This range used by Judge Limbaugh from the Guidelines for sentencing Giuffrida was entirely permissible. *See United States v. Fernandez*, 877 F.2d 1138, 1140-43 (2d Cir.1989) where there was a course of conduct and common scheme for distribution of 25 kilograms of cocaine. This amount was used to determine the Guideline range and not the five kilograms recited in the single count to which defendant pled guilty. Defendant claimed that he misunderstood such an application of the guidelines and sought to withdraw his guilty plea. His motion was denied. *See also United States v. Sweeney*, 878 F.2d 68, 69-70 (2d Cir.1989). Appellant in the case before us was told the range of punishment and further told that the Guidelines applied. We apprehend no basis for setting aside appellant's plea of guilty.

B. *Alleged Errors in Guideline Computation*

[28] Concomitant with his argument concerning withdrawal of his guilty plea, appellant contends that only the two kilograms in the count to which

914 F.2d 1527
914 F.2d 1527
(Cite as: 914 F.2d 1527)

Page 22

he pled guilty should be considered in computing the Guideline range. The evidence of the trial showed that appellant was involved in the distribution of five and perhaps six kilograms of cocaine. Contrary to appellant's contention, the additional kilograms of cocaine were proper components of the guideline computation. All relevant conduct can be used to arrive at the guidelines range under Sections 1B1.3 and 3D1.2 of the Guidelines. *United States v. Allen*, 886 F.2d 143 (8th Cir.1989); *United States v. Ehret*, 885 F.2d 441, 444-45 (8th Cir.1989); *United States v. Mann*, 877 F.2d 688, 689-90 (8th Cir.1989).

Giuffrida's other exceptions to the Guidelines computation are without merit. The record is devoid of any evidence that he acted under duress from Salsman. Appellant gave Salsman \$45,000 to buy cocaine in California and came voluntarily on February 15, 1989 to the Henry VIII Inn to pick up his share of the purchase. He delivered cocaine with regularity to Salsman each month in late 1988 and early 1989. His actions are hardly those of an individual under duress.

[29] Giuffrida complains of the upward adjustment in the Guidelines because he was an organizer or leader. We agree with the trial judge that this man was a leader and organizer of the drug ring under Guidelines Section 3B1.1. Such a determination is not clearly erroneous, which is the proper standard for review. *United States v. Holland*, 884 F.2d 354, 358 (8th Cir.1989).

The judgments of conviction are affirmed.

C.A.8 (Mo.),1990.
U.S. v. Hoelscher
914 F.2d 1527

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